Ribbon Sumyoo Corp. and J.S. Fiber, Inc., single employer *and* Local 300, United Industrial Workers Midwest, Seafarers International Union of North America, AFL–CIO. Cases 13–CA–29487 and 13–RC–18012

September 24, 1992

DECISION AND ORDER REMANDING AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 19, 1991, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel, joined by the Charging Party, filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In Case 13–CA–29487, the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act based on various statements by its supervisors to Genoveva Tello, the second-shift supervisor, between April 2 and 9, 1990. The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Tello on April 12, 1990, for her activity on behalf of Local 300, United Industrial Workers Midwest, Seafarers International Union of North America, AFL–CIO. These allegations are dependent on a finding that Tello is an employee and not a supervisor within the meaning of Section 2(11) of the Act.

In Case 13–RC–18012, an election among the Respondent's production and maintenance employees was held on May 25 and was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 30 for and 23 against the Union, with 3 nondeterminative challenged ballots. The Respondent filed timely election objections, which were dismissed except for Objection 2. This objection was consolidated for hearing with the pending allegations in Case 13–CA–29487. Objection 2 alleged that Tello's involvement in the Union's organizing campaign tainted the election as well as the Union's showing of interest supporting the representation petition.

The judge found, inter alia, that the Respondent, a single employer, failed to prove, by a preponderance of the credible evidence, that Tello is a supervisor. Based on this finding, the judge then concluded that the Respondent unlawfully interrogated, threatened, and discharged Tello and also unlawfully requested that she engage in surveillance of other employees' union activities. The judge further found that, whether or not Tello was a supervisor, her prounion activities prior to the election did not constitute objectionable conduct. In this connection, he observed that Tello was discharged 6 weeks before the election, she had not threatened employees or promised them any rewards based on their attitude toward the Union, and the record did not reveal any prounion activity by Tello after the filing of the representation petition on April 2, 1990. The judge also noted that the record failed to show that, prior to the election, any employee either knew about the Union's pending unfair labor practice charge seeking reinstatement of Tello or had any expectation that Tello would be reinstated.[1] The judge therefore recommended that Objection 2 be overruled and that the Union be certified as the exclusive collective-bargaining representative of the unit employees.

The Respondent excepts, inter alia, to the judge's finding that the Respondent failed to prove that Tello is a supervisor. The Respondent claims that it was not afforded a full opportunity to call and examine witnesses at the hearing, including Patricia Lalinde, Tello's counterpart and the first- shift supervisor, on the issues of Tello's supervisory status and credibility. The Respondent essentially argues that Lalinde's supervisory status, including when and how she acquired that status, bears directly on Tello's similar status and her credibility and establish that Tello was a supervisor. The Respondent contends that the judge erred in restricting the evidence to Tello's status by circumscribing Lalinde's testimony regarding her own status as a supervisor. During the hearing, the Respondent made an offer of proof regarding Lalinde's testimony in support of its position that Tello and Lalinde occupied identical shift supervisor positions and had the same authority.

We agree with the Respondent that the judge erroneously restricted its presentation of evidence at the hearing.[2] We, therefore, have decided to sever the two cases consolidated here and to remand Case 13–CA–29487, the portion of this proceeding dependent on Tello's status, to the judge for the taking of additional evidence regarding Lalinde's position and how it compared to Tello's position at the time in question. The judge shall also make further findings of fact and credibility resolutions and reconsider his prior credibility resolutions and his conclusions regarding the 8(a)(3) and (1) allegations in light of the additional evidence. In view of our determination to remand, we find it unnecessary at this time to pass on the Re-

[1] The judge also noted the parties' stipulation that in the preelection period the Respondent campaigned against the Union.

[2] See, e.g., *Vapor Corp*., 242 NLRB 776, 784 (1979).

spondent's other exceptions to the judge's decision relating to Case 13–CA–29487.

With respect to Case 13–RC–18012, we have reviewed the record in light of the exceptions and briefs and have adopted the judge's findings and recommendations overruling the Respondent's Objection 2 and find that a certification of representative should be issued.[3]

ORDER

It is ordered that Cases 13–CA–29487 and 13–RC–18012 are severed and Case 13–CA–29487 is remanded to Administrative Law Judge Robert W. Leiner for the limited purpose of taking the additional evidence described above and of making credibility resolutions, factual findings, and conclusions of law in light of the additional evidence.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolution of such issues, findings of fact, and if appropriate, revised conclusions of law, including a recommended Order where appropriate, regarding the issues on remand. Copies of the supplemental decision shall be served on all parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 300, United Industrial Workers Midwest, Seafarers International Union of North America, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees of the Employers, Ribbon Sumyoo Corp. or J.S. Fiber, Inc., both located at the facility which is now at 2701 W. Armitage, Chicago, Illinois; excluding office clerical employees, sales personnel, professional and managerial employees, guards and supervisors as defined in the Act.

[3] Member Oviatt notes that the judge's analysis is consistent with his position in *Kleen Test Products*, 302 NLRB 464 (1991), in which Member Oviatt concurred in overruling a similar employer election objection alleging impermissible supervisory solicitation of cards and other prounion conduct.

Deborah Cook-Schrock, Esq., for the General Counsel.
John S. Schauer, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Denise Polovac, Esq. (Katz, Friedman, Shur & Eagle), of Chicago, Illinois, for the Union.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard on 10 occasions on and between October 22 and December 4, 1990, in Chicago, Illinois, upon the General Counsel's July 26, 1990 complaint, amended at the hearing, and an objection to the election filed by Respondent, Ribbon Sumyoo Corp. and J.S. Fiber, Inc., single employer. The petition for certification in the above-captioned representation case, dated April 2, 1990, filed by Local 300, Industrial Workers Midwest, the Union herein, was served on April 3, 1990. On May 23, 1990, the Union filed an unfair labor practice charge alleging violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), because of Respondent's unlawful discharge of its employee, Genoveva Tello, on April 12, 1990, and because of unlawful threats and coercive interrogation occurring on or about March 29 and April 12, 1990.

On Friday, May 25, 1990, an election was held in a unit of Respondent's full-time and regular part-time production and maintenance employees employed at its Chicago, Illinois facility (excluding office clericals, sales personnel, professional and managerial employees, guards and supervisors as defined in the Act). Of the 59 eligible voters, 30 cast ballots for the Union, and 23 cast ballots against the Union. Three challenged ballots were not sufficient in number to effect the results of the election.

On June 1, 1990, the Respondent filed timely objections to conduct of the election and to conduct effecting the results of the election. Respondent objected, inter alia, on the ground of ''a supervisor's [Genoveva Tello's] involvement in the [Union's] organizing effort [which] was coercive of employees' Section 7 rights and 'taints' both the petitioning labor organization's showing of interest and the election itself.''

On July 26, 1990, the General Counsel, through the Regional Director for Region 13, issued a complaint and notice of hearing alleging the April 12, 1990 discharge of employee Genoveva Tello to constitute a violation of Section 8(a)(1) and (3) of the Act; and that Respondent, in violation of Section 8(a)(1), had inter alia, coercively interrogated an employee, engaged in unlawful surveillance and unlawfully threatened to close its plant.

On July 30, 1990, the Acting Regional Director for Region 13, recommended dismissal of all objections to the election except Respondent's Objection 2.[1] This objection related to the supervisor's involvement in the Union's organizing effort which, as above noted, allegedly was coercive of employee Section 7 rights and tainted both the Union's showing of interest and the election itself. Upon considering the matter, the Acting Regional Director found substantial and material issues raised by that objection and directed that it be resolved in a hearing consolidated with parallel allegations in the unfair labor practice complaint.

On August 10, 1990, Respondent filed its answer to the complaint in which it denied, inter alia, that Respondent un-

[1] On August 13, 1990, Respondent filed exceptions to the Acting Regional Director's dismissal of the other objections. I have been administratively advised that the Board, on December 6, 1990, inter alia, sustained the dismissal of all other objections.

lawfully interrogated or engaged in surveillance of its employees or threatened them with closure of the plant if the employees brought in the Union. It further denied that it created an impression of surveillance among its employees of their union activities and denied soliciting their complaints and grievances and promising them increased benefits in order to discourage employees from supporting the Union. Although Respondent admits discharging Genoveva Tello on April 12, 1990, and refusing to reinstate her thereafter, it denies it discharged her because of her union activities and, moreover, alleges that it did not violate the Act because, in any event, Tello, at all material times, was not an employee but was its supervisor as defined in Section 2(11) of the Act.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. The briefs, timely submitted by all parties, have been carefully considered.

Upon the entire record, including the briefs, and upon my most particular observation of the demeanor of the witnesses as they testified, together with an evaluation of their testimony and other evidence of record, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY SINGLE EMPLOYER

The complaint alleges that Respondent, Ribbon Sumyoo Corp. and J.S. Fiber, Inc., constitutes a single ''employer'' within the meaning of the Act. The complaint alleges, and Respondent admits, that at all material times both Sumyoo Corp. and J.S. Fiber, Corp. were Illinois corporations having the same office and place of business located at 2701 W. Armitage Avenue in Chicago, Illinois. While Respondent's answer denies common supervision or interchange of personnel of the two corporations, denies that they held themselves out to the public as a single integrated business enterprise, and denies single employer status, Respondent's answer admits that the two corporations, at all material times, have been affiliated business enterprises with common officers, ownership, directors, and management. It further admits that the two corporations have a common labor policy affecting employees of the two operations and have shared common premises and facilities, providing services and sales to each other. Furthermore, the record shows, and the parties concede, that the election in the above representation case was held without objection in a single unit of the employees of both corporations (Tr. 17). Finally, Respondent asserted at the hearing that the single employer issued was a ''non issue'' in the case and need not be litigated (Tr. 17–18). Its posthearing brief does not suggest to the contrary. On the basis of the record, I conclude that, as alleged, Ribbon Sumyoo Corp. and J.S. Fiber Corp., constitute a single integrated ''employer'' within the meaning of the Act.

Respondent, having further admitted that the two corporations, in calendar year 1989, a representative period, through their business operations, shipped from the Chicago, Illinois facility products and goods valued in excess of $50,000 directly to points outside the State of Illinois, and having also conceded that Respondent is an employer engaged in commerce within the meaning of the Act, I further conclude that Respondent, as above defined, is a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all material times, Local 300, United Industrial Workers Midwest, Seafarers International Union of North America, AFL–CIO (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The issues presented in this litigation are:

(1) The lawfulness of the discharge of Genoveva Tello on April 12, 1990. This issue consists of three subsidiary issues: (a) whether there is a prima facie case within Section 8(a)(3) that she was unlawfully discharged; (b) whether the prima facie case was either rebutted or overcome by sufficient evidence that she was discharged for otherwise lawful reasons; and (c) whether, in any event, the discharge is privileged because, as a matter of law, she was not an employee protected within Section 2(3) but Respondent's supervisor, and unprotected, within them meaning of Section 2(11) of the Act. See *Parker-Robb Chevrolet*, 262 NLRB 402, 403 (1982).

(2) Whether Respondent's conversations with Genoveva Tello, whether they be unlawful coercive interrogation, threats of plant closing, etc., constituted violations of Section 8(a)(1) of the Act. The determination of these issues again rest on the status of Genoveva Tello as a protected employee or a statutory supervisor, and unprotected. If she was indeed a supervisor, then Respondent's conversations with her would not constitute coercive action against an ''employee'' within the meaning of Section 7 and Section 8(a)(1) of the Act since supervisors, certainly for this purpose, have been excluded from protection as ''employees.'' *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981). If, on the other hand, she is a mere employee, then such conversations must be judged on the merits to determine whether they constitute coercive interrogation, unlawful threats, etc.[2]

(3) The alleged impropriety of Tello's prounion activities among unit employees tainting the election process and the outcome of the election. Respondent's Objection 2 asserts that Tello's prounion activities among unit employees prior to the election, tainted the election process and the outcome of the election. As will be seen hereafter, disposition of this separate issue does not depend upon a resolution of the supervisory status of Genoveva Tello. For I have concluded that, whether or not she was a statutory supervisor and engaged in the prounion activities among unit employees, Respondent's Objection 2 should be overruled and the Board should issue the appropriate certification of representative.

[2] Although the complaint alleges various acts of unlawful conduct by Respondent's agents, it was conceded by the General Counsel and the Union at the hearing, and the complaint amended accordingly, that all such Respondent activities occurred only with regard to Genoveva Tello. Therefore if Genoveva Tello is a statutory supervisor, none of the alleged acts of interference, restraint or coercion, otherwise unlawful within the meaning of Section 8(a)(1), could be found to constitute violations of that Section of the Act. *McDonnell Douglas Corp. v. NLRB*, supra; *Parker-Robb Chevrolet*, supra.

A. *Background*

The complaint alleges and Respondent admits that, at all material times, its supervisors and agents within the meaning of Section 2(11) and (13) of the Act of Respondent were: Jae Chul (Peter) Chang, owner-president; Rosa Chang, owner/secretary treasurer; Eric Kim, general manager; and Young Park, assistant plant manager. All of Respondent's above supervisors, and its two mechanics, both nonsupervisors, are Korean-speaking and salaried. Its employees, as far as this record shows, are all Spanish-speaking and do not speak English or Korean. Tello, Spanish-speaking, speaks considerable English. Respondent's supervisors and mechanics do not speak Spanish and speak English in varying degrees: Eric Kim, its general manager and its Spanish-speaking, nonsupervisory office clerical Wolford, speak English well. Respondent's owners, mechanics, as well as its assistant plant manger, speak little English although their comprehension is perhaps greater. They, nevertheless, communicated with Genoveva Tello in English or in a combination of signs and English. Tello and Wolford communicated with Respondent's employees in Spanish.

As above noted, Ribbon Sumyoo Corp. and J.S. Fiber, Inc. are both located at the present time at 2701 W. Armitage Avenue, Chicago, Illinois. Ribbon Sumyoo, on the first floor of the factory, is engaged in the manufacture of narrow width fabric webbing (Ribbons) ranging from 1/2 to 4 inches in a variety of colors. J.S. Fiber, located in the basement of the factory, manufacturers the plastic ''threads'' used by Ribbon Sumyoo to weave the ribbons. The fabric webbing is used as an industrial fastening device for packaging of various types.

Respondent's president Peter Chang came to the United States in January 1980, from Korea and started Ribbon Sumyoo Co. in Chicago in December 1980. He and his wife, Rosa Chang, each own 50 percent of the shares. By 1982, Respondent's employee complement rose from one employee working five looms making ribbon to eight employees working a greater number of looms. By 1986, Ribbon Sumyoo had grown to 20 employees and moved to the present location on Armitage Avenue. Before moving to Armitage Avenue, however, the Employer had initiated a two-shift operation which it continued at Armitage Avenue.

By the beginning of 1990, Respondent used approximately 55 weaving (loom) machines to manufacture the webbing. In early 1990, there were between 17 and 20 employees in the first shift; between 15 and 17 employees on the second shift. Each shift had a mechanic. Mechanic Sukhyon Chang, hired March 1989, not related to the Respondent's president, was originally employed to fix machines on the second shift. In March 1990, he was transferred to the first shift and the first-shift mechanic became the mechanic on the second shift.

The first-shift employees are composed of about 11 loom operators, 2 cutters, 4 ribbon winders, and 1 yardage counter. The second shift also employs about 11 operators but has only 1 cutter, 4 winders, and no yardage counter.

J.S. Fiber, Inc., in the basement of the Armitage facility, operates on a 24-hour basis, 7 days a week, producing thread for Ribbon Sumyoo Corp. It requires a continuous operation, requires four shifts of six employees each, and employs a mechanical engineer and an electrician for mechanical and electrical problems.

The first shift at Ribbon Sumyoo, in early 1990, was 5 days per week, from 7 a.m. to 3:30 p.m. Monday through Friday; the second shift, from 3:30 p.m. to 11:30 p.m. Prior to 1989, the second shift worked weekdays 3:30 p.m. to only 10:30 p.m. and 5 hours at regular rate on Saturdays. These are all 40-hour workweeks.

President Chang and General Manager Kim ordinarily leave the plant between 5 and 6 p.m. each workday (Tr. 199, 948). At about that time, the office and exit doors to the plant are locked and only the mechanic on the second shift has the key, to open office doors and the exit doors to permit employees to leave the factory whether specially during the shift or at the end of the shift. In addition, by 1990, on the second shift only the second-shift mechanic had the residence telephone number of the owners, the Changs.

Production scheduling at Ribbon Sumyoo was established by President Chang and Plant Manager Young Park. The general manager, Eric Kim, in 1990, was present in some of the production scheduling meetings. Production scheduling, of course, was based on the flow of incoming orders as to color, size, and quantity and existing inventory. When the schedule was arrived at, Respondent would call in, for the first shift, Patricia Lalinde, and on the second shift, Genoveva Tello. The owners and Young Park, first inquiring which lines were running a particular item and whether items were already in inventory, would decide the necessity of running the item. Neither Tello nor Lalinde were given the right to stop one order and put on another, but merely to report on production status and run production items. Lalinde and Tello were called in two or three times a week with regard to production scheduling orders.

Production of priority items after 1988–1989 was sometimes done on an overtime basis on Saturdays. Once the production scheduling required Saturday overtime work, Rosa Chang chose the employees to work overtime on Saturdays (Tr. 525–526) and would sometimes instruct Genoveva Tello to tell the employees which of them had been chosen to work overtime. While Peter Chang himself decided on the necessity for overtime work on Saturdays (Tr. 1034), I do not credit his testimony that it was Tello or Lalinde who decided which employees would work the overtime (Tr. 1035). In view of my crediting the testimony of a witness (Maria Estella Lopez), a longtime employee presently employed as an apparent supervisor, that it was Rosa Chang, herself, who chose the employees to work Saturday overtime (Tr. 525–526), I necessarily discredit both President Chang's testimony that Secretary-Treasurer Rosa Chang did not herself select employees for overtime work (Tr. 1035) and Rosa Chang's similar testimony (Tr. 1143).

For the first 2 years of a new employee's employment, the employee wages were automatically raised 25 cents per hour each 3 months. In 1990, the lowest paid loom operations were wages were paid $4.50 per hour; highest at $6.75 per hours. Lalinde was paid $7.50 per hour; Tello the highest paid—aside from the mechanics who were salaried (averaging about $9.37/hour) unit employees—at $9 per hour. All except the mechanics, punch the timeclock, are paid premium rates for overtime work hours, and are docked pay for absences or lateness.

Commencing in or about 1988, when Ribbon Sumyoo Corp. began utilizing threads produced by J.S. Fiber, Inc., it experienced production and quality problems in its webbing.

This caused frequent meetings between Ribbon Sumyoo management and Tello (representing the second shift) and Patricia Lalinde (representing the first shift). The meetings with Lalinde and Tello did not occur jointly but occurred separately. Loom operators were sometimes called in concerning specific problems. In the meetings in which Tello was present, she consistently stated that the reason for the lack of production and poor quality was the poor quality of these Fiber threads being used in the Ribbon Sumyoo weaving machines. Peter Chang repeatedly answered that although the yarn was a big problem it was not the only problem; that the attitude of the workers was a significant problem as well; and that the problem of attitude of the workers was her responsibility (Tr. 686).

Respondent employs separate mechanics on each of the shifts. In April 1990, mechanic Chang was the first-shift mechanic and Son was the second-shift mechanic. In March 1990, management allegedly experienced special production and undescribed employee problems on the second shift. At a meeting in March 1990, management (Young Park, President Chang, and General Manager Eric Kim) decided that its problems, especially poor output and poor quality, were basically Tello's fault. As a consequence, management shifted the second-shift mechanic (Chang) to the first shift and put the allegedly more experienced Son to the second shift. The mechanic's job was to repair the looms, open the doors, and obtain yarn by the box full on forklifts from J.S. Fiber in the basement where the yarn was too heavy for female employees. They also helped in shipping. Mechanic Son was paid a salary $300 for a 48-hour week; mechanic Chang was paid a salary of $375 for a 48-hour week. They, unlike other unit employees were not paid for overtime. Unlike Tello and other unit employees who are hourly paid, the mechanics, unit employees, do not punch the timeclock. Immediately after the discharge of Tello on April 12, mechanic Son was placed in temporary charge of the second shift where he had been the mechanic 6 weeks prior to Tello being discharged. Maria Estella Lopez was thereafter named the next second-shift supervisor 4 months later, in August 1990.

B. *Tello Named a ''Supervisor''; Union Activities and Discharge of Genoveva Tello; and Alleged Interrogation and Threats, the Prima Facie Case*

Genoveva Tello was hired as a loom operator in about 1984. In 1987, President Chang came to the work area and told Tello that thereafter she would cease operating the looms and would be in charge of fixing the looms, helping employees in using the machines, changing the threads on looms, and training new employees. At that time, he did not describe Tello as his supervisor. Tello accepted the change in responsibilities. By April 1988, however, Respondent described Tello as a supervisor (R. Exh. 9).

While there is no evidence of Tello's wage rate at that time, there is no dispute that by June 1989, her pay rose to $9 per hour. This came about because Tello told Peter Chang that she needed a raise because her ''job was too much'' and that the wages she was receiving were inappropriate for the work she was doing (Tr. 1241). Peter Chang recalled that Tello not only asked for a wage rate of $9 per hour immediately, but a wage rate of $10.50 per hour ''in about a year'' (Tr. 1047–1048). She said that she was the only person ''in charge of'' the night shift and had taken on more responsibilities. About a month after her request, she received the wage increase to $9 per hour. Patricia Lalinde, in charge of the day shift, was paid only $7.50 per hour because Tello, on the night shift, was all alone. Lalinde operated in the presence of Respondent's supervisors during regular business hours. At that time, and thereafter, Tello became Respondent's highest paid employee other than the salaried mechanics. Nevertheless, she and all other hourly rated employees continued to punch the timeclock, were paid for overtime, and had their wages docked for lateness and absences. This was unlike the treatment of all salaried employees, even nonsupervisory mechanics, who neither punched the timeclock nor were docked for lateness or absence nor were paid for overtime (Tr. 539–540).

Sometime in or about July 1989, Peter Chang and Rosa Chang called Tello into the office and told her that they were giving her the title of supervisor. In August 1989, Respondent distributed, along with all employees' paychecks, a memorandum or letter (R. Exh. 1)[3] in which they described Genoveva Tello as having been ''selected as the second shift supervisor'' (and Patricia Lalinde as being selected as the first-shift supervisor).

Upon issuance of this announcement (wherein Genoveva Tello and Patricia Lalinde were named to ''new'' positions), Tello asked the Changs whether there would be any changes in her benefits including insurance, the requirement to punch the timeclock, and other benefits (Tr. 62). The Changs told Tello that she would eventually have those benefits. After a few months, having seen no change in her benefits, salary, or other conditions of employment, Tello spoke to the Changs about the promised benefits (Tr. 69). When they told her that the only thing she would receive was the very large wage she was receiving, Tello told them that she did not want the title of supervisor because there was no real change

[3] The memorandum or letter is as follows:

August 24, 1989

Dear Employees:

Followings [sic] are the company rules concerning dismissal of workers.

(1) Absence from work without prior notification and subsequent permission to and from the office [sic].

(2) Coming to work late and/or leaving work early without prior notification and subsequent permission to and from the office.

(3) Refusing to follow supervisor's instruction.

(4) Stealing and/or intentional damaging of the company property.

(5) Employees breaking the rule 1, 2, and 3 more than three times within a year will be subject to termination from work. Employees breaking rule 4 will be terminated immediately.

Also as of August 15, 1989, the following persons took a new position [sic].

Mr. Young Park is promoted as a new assistant plant manager. His new responsibilities are to assist Mr. Chang in production, supervising shipping a receiving, and other operational matters.

Miss Patricia Lalinde is selected as the first shift supervisor. Her responsibilities are to assist both Mr. Chang and Mr. Park in production and the operation of the morning shift.

Miss Genoveva Tello is selected as the second shift supervisor. Her responsibilities also are to assist Mr. Chang and Mr. Park in production and the operation of the afternoon shift.

Jason Park/General Manager

of benefits or in her working conditions.[4] The Changs insisted that she take the title; that eventually, all the benefits that they had spoken of would come to her; and that Respondent was just starting out and still growing.

In fact, both prior to August 1989 and after receiving the title and the pay raise, the terms and conditions of Tello's employment did not change: she continued to have her wages docked if she came late; she continued to punch the timeclock, continued to train new personnel, to fix machines, to help employees run machines, to change the colors of the webbing, and to run looms for absent or vacationing employees.

Nevertheless, Tello continued to attend meetings of supervisors (in the owner's office) addressing general production problems. While employees were seldom called into these meetings except when their particular production was involved, the shift mechanics were often in attendance at production meetings. Though Eric Kim, the general manager, had only a modest responsibility in production (that function being assigned to the plant manager, Young Park), he sometimes attended the meetings. Whereas Tello attended such meetings perhaps once a month in 1988, by 1989, they were up to twice a month (Tr. 1245–1246).

At no time through the summer of 1989, did any Respondent supervisor ever tell Tello that she had the authority to discipline employees.

Perhaps as a result of the somewhat less then sanguine feelings Tello felt for Respondent's owners flowing from the failure of Tello's expectations at the end of 1989, and apparently after the turn of 1990, Tello contacted the union. By sometime in February 1990, a representative of the union contacted her. She told him that she was interested in having the union in Respondent and he told her to speak to the employees to see whether they were interested. On or about February 16, 1990, between 8 and 9 p.m., she spoke individually with 17 or 18 second-shift employees about the ways in which the Union could help them and wanted to know their desires. At about 11:30 that night, after the end of the shift, she called a meeting of all 17 or 18 second-shift employees. They told her that they were interested in the Union. By the end of February, Tello told the union that the night-shift employees, and some of the day-shift employees, were interested and wanted to discover the ways in which the Union could help them. Tello had already asked a night-shift employee to spread the word to the morning-shift employees of the possibility of getting the Union.

By early March, a meeting with the Union took place at the union office. The entire night shift was there along with 8 or 9 morning-shift employees, a total of 26 to 28 employees. The Union told them of the Union's ability to improve their working conditions and distributed membership application cards. Tello signed a card.[5] At about this time, the mechanics were shifted because of poor second-shift production.

A few days after the March union meeting, at the end of the second shift, Tello went to the basement and spoke to 10 to 12 employees of J.S. Fiber about the Union helping them. Tello thereafter gave a J.S. Fiber employee 14 to 15 union membership application cards which were thereafter returned to her already signed. Tello sent these to the Union as well.

The record regarding sequence of meetings between Tello and representatives of management (President Chang and General Manger Eric Kim) concerning her union activities, the union sentiments of employees and various threats and promises, is contradictory and confusing. As is not unusual, the contradictions and confusions relate, in large part, to dates and who was present at particular meetings. Nevertheless, the record shows that in at least three meetings on or about April 2, 6, and 9, 1990, in President Chang's office, President Chang and/or General Manager Kim spoke with Genoveva Tello about the Union.

There is no dispute that on April 2, in President Chang's office, General Manager Kim showed her a letter from the Union (R. Exh. 5) asserting that the Union had been designated bargaining representative by a majority of Respondent's employees and demanding recognition and the commencement of collective bargaining. Chang and Kim asked her if she knew anything about the letter and Tello denied knowing anything about the matter. They then asked her why the employees wanted the Union and what the problems were that were causing them to desire a union. Tello told them that she had no idea. Kim testified that he believed that President Chang did not believe her denial. In any event, they told Tello to keep her ears open and let them know what the problems were that the employees were concerned about. They told her that if they could discover what the employees' problems were, they could see if they could solve the problems (Tr. 781). Kim asked Tello to investigate who was behind the union movement, observed that she was close to the employees and the Employer wanted to find out why the employees wanted a union. He told her to inform him as soon as possible and that she should tell the employees that benefits were coming[6] including an increase in wages.

[4] The record as a whole and the context of this conversation require that sua sponte, I correct the transcript (Tr. 61, L. 16) to read: ''I told them I was not accepting the offer.'' See Tr. 64, L. 1 through 7.

There is a dispute whether Tello also demanded a salary of $25,000 per year. President Chang testified that he called clerical Wolford into the office as a witness. Wolford (Tr. 663) corroborated Chang in part. Significantly however, Chang testified specifically that he told Wolford the size of Tello's yearly salary demand: $25,000 (Tr. 1051). Wolford's testimony on the event fails to mention the amount, or even any salary reference, a fact she surely would have remembered especially when testifying, in rebuttal, after President Chang's testimony on the point. Furthermore, Chang testified that the $25,000/year salary demand was the only matter that he called Wolford into the office for and that there was no other conversation other than to confirm the salary demand (Tr. 1051). Wolford, contradicting Chang, testified that Chang called her to the office to transmit to Tello (in Spanish) his desire to have Tello come to work earlier (without pay) (Tr. 561 et. seq.). Were the matter substantial, I would credit Tello's denial that she ever demanded a salary. Chang's and Wolford's credibility is another matter.

[5] Although Tello persisted in denying that she was the leader of the February 16 meeting after 11:30 p.m., it is clear that Tello was the leader, arranged for the meeting and addressed it. The fact that other employees may have spoken does not detract from this conclusion (Tr. 256).

[6] Direct examination:

Q. Mr. Kim, in this conversation, this first one with Ms.Tello, did you advise Ms. Tello that there would be new company benefits or wages?

A. New company benefits or wages?

Q. Yes, sir.

Continued

To the extent that Tello also testified that Kim told her that she would no longer have to punch a timecard and would start receiving a salary. In view of Kim's denial, I do not credit this portion of Tello's testimony.

In a meeting several days later, on April 6, they asked Tello if she had found out anything else about the employees' union activity (Tr. 782, et. seq.). She told them that she had learned nothing. Kim then asked her what the employees' problems were and she told them that the employees felt that the factory was too cold in the winter, too hot in the summer. Kim told her that Respondent could not solve those problems right away. President Chang told her that he did not believe her denial of not knowing who the leaders of the union movement were. He told her that she knew everybody; that all of the employees were her friends and that she had recruited practically all the employees. Tello made no response.

Kim stated that she was the supervisor and had to stay with Respondent's interest and not with the employees. Kim then told her that Respondent was not too interested in who started the Union but why the employees wanted to bring the Union in.

President Chang then asked her why she had been in the basement meeting with employees of J.S. Fiber and told her that she did not belong there. When Tello told him that she was in the basement getting threads for the loom machines, President Chang told her she was lying (Tr. 1064) and said that mechanic Chang gets the threads. He added that even if she had been there getting threads, she had no business holding a meeting there.

In an April 9 meeting, Tello was alone with President Chang in his office. Chang raised the union subject and told her that he knew who was responsible for bringing the Union in: it was Tello. She asked him if he had any proof and Chang told her that proof was not necessary. When he asked again why she had been talking to the J.S. Fiber employees in the basement at night and when Tello told him that the Fiber employees were confused about a certain production cone, Chang told her that he did not believe her. Chang told her that he did not like unions; that unions only used employee salaries for their own ends; and that he did not understand why the employees wanted the Union since Respondent had given them good benefits and salaries. He said if the Union came in, he would either move the factory or shut it down (Tr. 54).[7]

Tello recalls telling Chang in this meeting, when he asked her what employees' problems drove them to the Union, that employees were not properly paid for vacation time or holidays; they had no insurance and had bad working conditions (including rats) and no access to a public telephone.

On April 12, 1990, Respondent discharged Tello. She was called into President Chang's office and found Chang, Eric Kim, the mechanic, and Plant Manager Young Park there. Kim told her that Respondent had spoken to its lawyer and was letting her go. When Tello asked for the reason, Kim told her that she had disobeyed Respondent's rules (exactly what rules were not mentioned) and that the rate of production had gone down. Tello told Kim that she did not believe him and wanted the real reason they were firing her. He told her that she knew why: that it was on account of what she had done with the Union (Tr. 56). He told her that she could leave in a week or on that day. Tello told Kim that she would leave that day. She asked Kim for a letter stating the reasons they were firing her but Kim told her that he would not give her the letter. After President Chang and the others spoke in Korean, Kim told her that they had decided to give her a letter. Tello then waited in the office for the letter to be typed. When she received it, the reasons given were that she had disobeyed the rules of the Company (exactly which rules were not stated) and because her performance in the work place had been diminishing (Tr. 58). She then asked Eric Kim to put the real reason in the letter but he refused, told her that it was her choice to take the letter or leave it, and told her that if she wanted to see her lawyer she should do so.

Although President Chang testified that production on the second shift was poorer than on the first shift, the record, taken as a whole, fails to show that Respondent, at the hearing, entered a credible defense to the firing of Tello on the ground of poor production. Neither further credible testimony concerning poor second-shift production nor Tello's role therein was produced. No records to support either assertion were offered; nor were records offered to compare first- and second-shift production or efficiency; nor was the absence of any such records explained.

C. *Discussion and Conclusions*

1. Violations of Section 8(a)(1)

Respondent's owner (Chang) and general manager (Kim) asked Tello to discover who the sponsors and instigators of the union movement were, to keep her eyes and ears open to discover them and, in addition, to report back the problems among the employees which caused them to seek union representation. Respondent told her that on learning such problems, Respondent could attempt to resolve the problems and thus avoid unionization. Kim told Tello to tell employees that benefits and wage increases were on the way. Refusing thereafter to accept Tello's denial of knowledge, Respondent angrily accused her of being the ringleader of the union movement. Further, Respondent threatened to close down the plant or relocate it to the China mainland in the event the employees brought the Union in. I conclude from the testimony of Tello, Kim, and President Chang, that in or about April 2, 6, and 9, 1990, Respondent, in violation of Section 8(a)(1) of the Act, engaged, as a prima facie matter,[8] in unlawful and coercive interrogation of Tello; made unlawful threats to close down the plant or to relocate it in the event the employees brought the Union in; unlawfully promised to seek out and adjust employees grievances and to increase wages and benefits in order to avoid unionization.

A. I don't think so, no.
Q. Well, that is not good enough, Mr. Kim.
A. No, there isn't. We didn't talk about that.
I do not credit this denial.

[7] Kim admitted (Tr. 803 et. seq.) that President Chang had mentioned to him that he might relocate the business to mainland China in the event that the union came in and that he (Kim) ''may have'' told the same thing to Genoveva Tello (Tr. 804) sometime after the April 6, 1990 meeting with Tello (Tr. 805).

[8] At this juncture, an ultimate conclusion must await resolution of the defense of Tello's status as a statutory supervisor.

2. The April 12, 1990 discharge of Tello

There is little question that there were production and quality problems on both shifts. It was a chronic condition since the 1988 introduction and use of poor quality J.S. Fiber yarn. Although there was some suggestion that Tello was discharged, inter alia, because of poor second-shift production performance, I have credited, in substance, Tello's testimony and find that that matter, appearing in the termination letter, was a mere afterthought and the product of Respondent attempting to fabricate a plausible-defense. I make a finding of pretext in spite of my crediting President Chang's testimony (Tr. 1066) that before firing her, he asked her why it was that only her night shift which produced bad products.[9] The existence of chronic quality and production problems on both shifts—even if greater on the second shift—did not suddenly become the cause for discharging Tello. The pretextual nature of the alleged poor second-shift production is apparent when President Chang testified that immediately after admonishing Tello on poor second-shift production, he told her (Tr. 1067) that he did not believe her claim of her not knowing anything about the Union. To the extent that Chang testified that the reasons for her discharge were her denial of bad product on her shift and her continued denial of being a supervisor, leading him to the conclusion that he could not trust her anymore in that position, I reject such testimony as a pretext. I credit his testimony that he fired her because he found her lying ''about everything'' (Tr. 1068). It is clear that, by April 12, 1990, as General Manager Kim testified, Respondent had already been in touch with its lawyers concerning the discharge of Tello. I further credit Chang's testimony that what particularly infuriated him was Tello's denial of being a supervisor (Tr. 1067). Obviously, if she were a supervisor and engaging in prounion activities, Respondent could discharge her, under ordinary circumstances, with impunity. *Parker-Robb Chevrolet Co.*, 262 NLRB 402 (1982).

In view of President Chang's participation in the unlawful interrogation and threats directed against Tello in President Chang's own office, Chang's accusation of her being the union leader; in view of his repeated testimony that he believed her to be a liar in denying that she knew nothing of the employees' engaging in union activities; and further, in view of his admission that he suspected that Tello was lying in denying knowledge of employees' and her own union activities (Tr. 1068–1069), I am obliged to discredit his testimony (Tr. 1068–1069) that, with regard to what ''Tello had done regarding the union,'' he ''didn't know anything about it'' (Tr. 1069).[10]

As a matter of timing, President Chang's accusation that Tello was the union leader, Respondent's contemporaneous unfair labor practices (coercive interrogation, threats, promises) demonstrating union animus, his belief that Tello was lying in denying knowledge of the union activities of Respondent's employees and of her own union activities, and because of the pretextual additions of Respondent's further reasons for discharging her (chronic poor production on the second shift), I conclude that, as alleged, Respondent, on April 12, 1990, in violation of Section 8(a)(3) of the Act, unlawfully discharged Genoveva Tello as a prima facie matter. Further, I regard President Chang's insistent testimony, that he discharged Tello because of her infuriating persistence in denying her supervisory status, was actually based on his acquired knowledge that if she were a supervisor, he could discharge her with impunity for engaging in union activities. Her denial of such status was understandably frustrating.

I further conclude, in the presence of the General Counsel's strong prima facie case of an unlawful discharge, that Respondent has failed to prove, under its *Wright Line* burden (251 NLRB 1093 (1980); enfd. 662 F.2d 899 (1st Cir. 1981); cert. denied 455 U.S. 989 (1982)), that it has either rebutted the prima facie case, *NKC of America*, 291 NLRB 683 (1988), or that, regardless of the prima facie case, it would have discharged Tello, in any event, because she denied being a supervisor, because of her poor performance on the second shift, because of poor production and quality on the second shift or because of any other reason. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400–401 (1983). Whether Respondent was nevertheless absolved from statutory liability by virtue of Tello's status as a ''supervisor,'' within Section 2(11) of the Act, is another matter, a matter of affirmative defense on which Respondent has the burden of proof.

3. Definitions of supervisory status

Respondent's principal defense (as well as the basis for its objection to the election) is that Tello, certainly by the time of discharge, was a statutory supervisor within Section 2(11) of the Act. In that status, she was not an employee within the meaning of Section 2(3) of the Act and could be discharged with impunity for engaging in union activities. *Parker-Robb Chevrolet*, 262 NLRB 402. Similarly, Respondent argues that since Tello was the principal source of employees engaging in union activities and, indeed was the moving force behind the employees' execution of most, if not all, of the membership cards on which the Union's showing of interest to secure the election was based, then not only were the cards tainted by supervisor influence, but the election itself was tainted by Tello's substantial participation in creating the original and continuing employee interest in the Union.

A ''supervisor'' is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[9] The uncontradicted evidence shows that there were production and quality problems on the first shift as well.

[10] The credited testimony (Tr. 414–417) of Maria Estella Lopez (Respondent's apparent present second-shift supervisor) is that as early as March 1990, Rosa Chang (secretary-treasurer) asked her what Tello said to employees at a meeting on the previous night. Lopez told her that Tello told the employees that Respondent wanted to know what their problems were because the Union wanted to come in. President Chang's denial of knowledge, at the time of Tello's April 12 discharge, of Tello's union sympathies and activities, is not credible. Tello was merely following Kim's and Chang's direction at this time, perhaps with some warmth.

The possession or exercise of any one of the enumerated powers or its exercise with ''independent judgment,'' suffices to confer supervisory status. *NLRB v. Island Film Processing Co*., 784 F.2d 1446, 1451 (9th Cir. 1986). In determining the status of ''supervisor,'' the obligation is to inquire into actual duties, not merely job titles or classification. *Longshoremen v. Davis*, 106 S.Ct. 1904, 1915 fn. 13 (1986). The enumeration of supervisory powers in Section 2(11) may be deceptively broad. It is specifically limited by the requirement that in the exercise of any of the enumerated elements, there must be the use of independent judgment rather than merely routine or clerical decisions, *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991); enfg. 297 NLRB 155 (1989). Specifically, the requirements of the use of ''independent judgment'' and the insistence that its exercise relate to matters which are not merely ''routine or clerical'' flow from the congressional intent to withhold from statutory supervisory status mere ''straw bosses, leadmen, and other low-level employees having modest supervisory authority.'' *NLRB v. Res-Care*, 705 F.2d 1461, 1466 (7th Cir. 1983); *NLRB v. Southern Bleachery & Printworks*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

In the underlying case in *Southern Bleachery & Printworks*, 115 NLRB 787, 791 (1956), the Board stated:

> Throughout the industry of this nation, there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artians have a close community of interest with their less experienced co-workers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers [citation omitted].
>
> The Board has therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions, whose authority is based upon their working skill and experience [citation omitted].
>
> We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship, as Congress obviously knew.

It is also to be borne in mind that the exercise of independent judgment, alone, does not suffice; for the decisive question is whether the individual possesses the authority to use his or her independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2(11) of the Act. *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331, 334 (1st Cir. 1948). Indeed, a showing of the exercise of an instance or two of discipline is not sufficient to confer supervisory status as a matter of law. *Highland Superstores v. NLRB*, supra, citing *NLRB v. Berger Transfer & Storage Co*., 678 F.2d 679 (7th Cir. 1982); and *NLRB v. Orr Iron Co*., 508 F.2d 1305 (7th Cir. 1975) (night-shift foreman not a supervisor).

Finally, because of its possible application to the instant case, a word might be said concerning the Ninth Circuit's position with regard to the use of ''secondary criteria'': the *perception* in the eyes of employees of a coemployee's supervisory status notwithstanding a *failure* to prove the existence of any of the enumerated powers (combined with ''independent judgment'') in that coemployee. The perception of employees concerning the supervisory capacity of a coemployee was a sufficient ground for the court of appeals, reversing the Board,[11] to set aside an election. *NLRB v. Chicago Metallic Corp*., 794 F.2d 527 (9th Cir. 1986). The court specifically distinguished its action setting aside the election (based on employee perception of this putative supervisor) from the case of the employer directing unfair labor practices (threats of discharge) against the same person. While the court of appeals set aside the election because of employees' *perception* of this employee (Picazzo) as a supervisor, in the case of unfair labor practices against the same employee, it found the perceptions of employees to be *irrelevant*. It therefore held, that threats against this employee, whose employment functions did not actually meet the statutory criteria of Section 2(11) of the Act, were unlawful. Cf. *NLRB v. Yuba Natural Resources*, 824 F.2d 706 (9th Cir. 1987), enfg. 279 NLRB 1 (1986).

4. Tello's supervisory status; Respondent's objection to the election based thereon

Because (1) a considerable body of evidence was adduced by Respondent, to demonstrate not only Tello's supervisory status but, in any event, the perception of employees of her supervisory capacity (she, except for mechanics, was not only the highest paid of all Respondent's 65 employees, but, alone, was held responsible for production and quality on the night shift; was openly called, and held out to be, a ''supervisor''; verified employee timecard claims when requested by Respondent; had the capacity to stop other employees' looms in case of malfunction; attended supervisor meetings concerned with production); and because (2) a Board-conducted election may be set aside because of a supervisor's participation in a union campaign which reasonably tends to coerce employees or is likely to impair employee choice, *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (9th Cir. 1986), I deem it prudent to decide the questions of Respondent's objection and the setting aside of the Board election prior to determining the unfair labor practice allegations concerning the lawfulness of the discharge of, and statements to, Genoveva Tello based on her legal supervisory status (rather than coemployee *perception*).

In fact, however, for purposes of disposing of Respondent's Objection 2 (G.C. Exh. 1(s)): that Tello's involvement as a supervisor was coercive of employees' Section 7 rights and ''taints'' both the Union's showing of interest and the election itself, it is unnecessary to resolve the question of whether Tello, on the basis of various activities, her title and her position, might be reasonably perceived by employees to be a supervisor, cf. *NLRB v. Chicago Metallic Corp*., 794

[11] I am, of course, bound by the Board's position. I mention the court position only because of its limited application. In any event, *Chicago Metallic* has no relevance herein because, as will be seen, the election should not be set aside even if Tello was proven to be a statutory supervisor.

F.2d 527 (9th Cir. 1986); or whether, indeed, she was actually a statutory supervisor within the meaning of Section 2(11) of the Act.

It is undoubtedly true that Tello was the moving force among Respondent's employees in gaining the execution of the membership application cards which demonstrated a showing of interest which, in turn, led to the Board-conducted election in which the Union received a preponderance of the valid votes counted: 30–23 in favor of the Union. Thus, granting Tello's effective spearheading of the Union's showing of interest and the employees interest in the Union, the dispositive facts nevertheless are: (1) Respondent discharged Tello on April 12, 1990; (2) the secret-ballot election was held 6 weeks later (on May 25, 1990); and (3) the unfair labor practice charge (on Tello's behalf) was filed by the union at the Board's Regional Office at 4:19 p.m. on May 23, 1990, but not served upon Respondent Sumyoo/J.S. Fiber until May 29, 1990 (G.C. Exh. 1(j)); and apparently, not actually received by Respondent until June 1, 1990 (post office green card signed by Carol Wolford, stamped June 1, 1990) (G.C. Exh. 1(j)).

In the recent *Meridian Industries*, 302 NLRB 464 (1991), an employer objected to the election because its supervisor ''directed and/or ratified impermissible supervisory solicitation of authorization cards, campaigning, electioneering, and other improper conduct.'' It was *undisputed* that this person was a low-level statutory supervisor within the meaning of Section 2(11) of the Act and, like Tello, was the employer's ''highest authority figure'' during most of the second shift in which he worked.[12] He regularly initialed and verified employee timecards, see *John N. Hansen Co.*, 293 NLRB 63 (1989), approved employee requests to leave work early, and excused their absences. He was introduced to second-shift employees as their superivsor and these employees, in fact, considered him to be their supervisor. However, he was terminated 3 weeks before the election. During the organizational campaign, the supervisor signed a union authorization card, attended union meetings where he spoke favorably about having the union and talked individually to employees about the need for employees' sticking together. During the critical period (i.e., after the filing of the petition), he campaigned for the Union, distributed authorization cards, provided transportation for employees to attend union meetings, and he attended the meetings.

The Board's hearing officer, overruling the Employer's objection to the election concluded that the supervisor's conduct could not reasonably have coerced or lured employees into supporting the union. He relied on (1) the Union's campaign ground-work laid by nonsupervisors; (2) there was no evidence that the supervisor threatened anyone with retaliation for opposing, or promising benefits for supporting, the union; (3) he was a low-level supervisor whom the employees, on his shift, could not reasonably perceive as having the authority to effectuate significant rewards or punishment; and (4) ''Finally, and perhaps most importantly, [the supervisor] was, in fact, terminated . . . well before [3 weeks] the election.'' The majority of the Board, overruling the objection, adopted the hearing officer's analysis of the objection as being in conformance with Board precedent.[13]

Member Oviatt, concurring, based his concurrence on a ''far narrower'' ground than that of the hearing officer. Rather than accepting the hearing officer's analysis, Member Oviatt focused on the question of whether employees subject to the supervisor's supervision could be coerced into supporting the Union because they feared *future* retaliation by him or because they anticipated his rewarding them in the *future*. See *Sil-Base, Co.*, supra. Holding the fact that the groundwork for the union's campaign being laid by nonsupervisors to be material, he found significant the fact that the supervisor actively joined the campaign and promoted it, conveying to employees the idea that it would be ''wise for them to support the union if they wanted to be in favor with him.'' He concluded that the failure to prove that the supervisor made an actual threat or promise did not necessarily eliminate employee concerns about avoiding retaliation by, or receiving future rewards from, the supervisor.

Member Oviatt concurred, however, in overruling the objection because (a) the supervisor was terminated 3 weeks *before* the election; and (2) the employer notified the employees more than a week before the election that it was disavowing and repudiating the supervisor's unauthorized prounion activities and assured the employees against any fear of retaliation from the supervisor in the event the union lost the election. In particular, Member Oviatt found dispositive that 3 weeks before the election, the supervisor's relationship with the employees whom he supervised was ''severed.'' In a footnote, Member Oviatt observed that while the union, well before the election had filed a charge alleging that the supervisor was discriminatorily laid off because of his union activities, and though the charge was not dismissed until *after* the election, the employer's exceptions failed to allege that any employee *knew about the charge* or otherwise understood that the supervisor might be reinstated. The entire Board, therefore, refused to set aside the election.

Similarly dispositive on the effect of the preelection discharge of a prounion supervisor on the validity of the election, there is *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332 (4th Cir. 1987), enfg. 280 NLRB 1425 (1986). In that stronger case, unlike the instant case, the employer argued that the election was invalid because the supervisor *threatened* to discharge an employee before the election if he did not support the union. The election was held on May 12, 1983. Six weeks *before* the election, the supervisor was discharged because of poor work performance. On April 11, 1983, the union filed an unfair labor practice charge seeking reinstatement of the supervisor. That charge was pending throughout the preelection period and was dismissed 8 days *after* the election. The court agreed with the Board that the employer had not met its burden of showing that the supervisor's

[12] The General Counsel and the Union assert that the salaried and higher paid shift mechanics are of even greater authority than Tello. I need not resolve that issue.

[13] *Sil-Base Co.*, 290 NLRB 1179 (1988); *Cal-Western Transport*, 283 NLRB 453 (1987). In *Meridian Industries*, supra, the Board accepted the hearing officer's recitation of the *Sil-Base* and *Cal-Western* rules: that the prounion conduct of a statutory superivsor may constitute objectionable conduct warranting setting aside an election in two situations: (1) when the Employer takes no stand contrary to the supervisor's prounion conduct, thug leading employees to believe that the employer favors the Union; or (2) when the supervisor's prounion conduct would coerce employees into supporting the Union out of fear of future retaliation by, or rewards from, the supervisor.

prounion activity interferred with the election. The court held, that the supervisor's threats could not have interferred with the election because it was not possible, in view of his preelection discharge, for the threats to have been carried out.

The employer's alternate contention in *NLRB v. Hydrotherm*, supra, was that the election should nevertheless be set aside because, unlike the instant case, the unfair labor practice charge filed on the supervisor's behalf, was pending during the preelection period and therefore the rehiring of the supervisor was anticipated by employees, thus justifying the employees' belief in the possible effectuation of the supervisor's threat of discharge. In the instant case, the Union's May 23, 1990 unfair labor practice charge seeking reinstatement of Genoveva Tello was filed 2 days before the May 25 election, but did not even leave the Board's Regional Office until May 29, 1990 (G.C. Exh. 1(j)), therefore 4 days after the election, and was not received by Respondent until June 1, 1990 (G.C. Exh. 1(j), green card of U.S. Postal Service) thus 7 days *after* the Board-conducted election. It is fair to say, therefore, that on the present record, absent evidence to the contrary concerning employee actual knowledge of the charge, there could be no reasonable employee expectation of the reinstatement of Tello at the time the election took place.

Moreover, there is here no evidence of a Tello threat or promise made to any employees for support or nonsupport of the Union, nor of any Tello prounion act in the critical period *after* filing of the petition. *Cal-Western Transport*, 283 NLRB 453 (1987). Even assuming, therefore, Member Oviatt's further position that there need not be an *explicit* threat in order for employees' votes to be tainted by a supervisor's prounion preelection activities, Respondent's discharge of Tello, 6 weeks before the election, the same period as in *NLRB v. Hydrotherm*, supra, vitiates the threat in the absence of evidence, not present here, of employee reasonable fear of Tello being reinstated. On that latter reinstatement issue, a stronger application of the *Hydrotherm* rule exists in the instant case because in *Hydrotherm*, the charge was pending throughout the critical preelection period and was dismissed 8 days *after* the election. In the instant case, although the charge was filed 2 days before the election, it did not leave the NLRB Regional Office until 4 days *after* the election, and, on this record, was not received by Respondent until June 1, 1990, 7 days *after* the election. Therefore, on this record, employees could not reasonably fear that Tello might be reinstated since they knew nothing of the charge before the election.

The record discloses that Respondent, bearing the burden of proof, has presented no evidence to demonstrate that its employees knew of the pending unfair labor practice charge or had any expectation that Genoveva Tello would be reinstated. Based on this conclusion, the court in *NLRB v. Hydrothern* held, that the threats by the long-discharged supervisor and the conduct of the parties created no reasonable expectation that the supervisor would be reinstated. It therefore concluded that the supervisor's threat in the event the employee did not support the union did not interfere with the employees' free choice in the election, 824 F.2d 332 (4th Cir.). See *Quick Find Co.*, 259 NLRB 1051, 1061–1062 (1982).

I am constrained, therefore, to conclude that, whether or not Genoveva Tello was a statutory supervisor at the time of her discharge on April 12, 1990; and whether or not the employees reasonably *perceived* her to be a statutory supervisor within Section 2(11) (assuming, arguendo, that she was not a statutory supervisor), her prounion activities of soliciting employee membership in the Union, distribution of union cards, and making statements supportive of the Union to the employees before the election, does not constitute interference with the employees' free choice in the election. This conclusion is based on the discharge of Tello 6 weeks before the election; the absence of any Tello threat or promise of reward based on employee attitude toward the Union; the failure of the evidence to show that the employees knew of the pending unfair labor practice charge before the election; the failure of the evidence to show that any employee, before the May 25, 1990 election, had any expectation, reasonable or otherwise, that Genoveva Tello would be reinstated; and the of evidence of any Tello prounion act after filing of the April 2 petition.

While in *Meridian Industries*, 302 NLRB 464, the employer disavowed the supervisor's prounion remarks, in the instant case, the parties stipulated that, in the preelection period, Respondent campaigned against the Union and asked employees to vote against the Union (Tr. 1218–1219). Thus, there can be no suggestion that, in view of Respondent's opposition to the Union in the preelection period, it was in any way adopting its alleged supervisor's prounion stance, thus impairing employee free choice. See footnote 13, supra.

Thus, I conclude that Genoveva Tello's prounion activities prior to the election, whether or not she is, or may be perceived to be, a statutory supervisor, did not interfere with the employees' free choice in the May 25, 1990 election. I therefore overrule Respondent's timely Objection 2, filed June 1, l990.[14]

5. Discussion and conclusion

Genoveva Tello's status as a statutory supervisor

If Genoveva Tello is a supervisor within the meaning of Section 2(11) of the Act, as Respondent contends in its affirmative defense, then certain alleged coercive interrogation and other remarks addressed to her do not constitute violation of Section 8(a)(1) of the Act and her discharge, even due to her union activities, does not violate Section 8(a)(3) ofthe Act because, in both cases, Respondent would be dealing with a person who is not an ''employee'' within the meaning of Section 2(3) of the Act and not protected in that status by Section 8 of the Act. *Parker-Robb Chevrolet*, 262 NLRB 402; *Highland Super Stores v. NLRB*, 927 F.2d 918

[14] To the extent Respondent argues that Tello's prounion activity in the Union's gaining of a showing of interest (by employee execution of union membership application cards) ''tainted'' the Union's showing of interest upon which the election order was based, such argument has already been rejected by the Board. The cards are not here the basis of showing the Union's majority status. A board election is the preferred method of ascertaining employee choice, *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969). The ''showing of interest'' is only a Board administrative matter and the results of an election, found untainted herein, are a safer and more reliable indication of employee sentiment than membership application cards. See *Quick Find Co.*, supra (''Once an election has been held, as here, that inquiry [into the prior allegedly tainted showing of interest] becomes pointless'').

(6th Cir. 1991). The discharge of a supervisor for union-related reasons does not constitute an unfair labor practice, *Longshoremen v. Davis*, 106 S.Ct. 1904, 1908 fn. 4, for the Act protects employees but not supervisors from being discharged for their union activity or status, *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985). On the other hand, if Genoveva Tello is not a statutory supervisor, then, regardless of any ''secondary indicia,'' including the *perceptions* of other employees as to her supervisory status (which perceptions are irrelevant), the alleged coercive interrogation, other threats addressed to her, and, indeed, Respondent's April 12 discharge of Genoveva Tello, violates Section 8(a)(1) and (the discharge) Section 8(a)(3) of the Act. See *NLRB v. Chicago Metallic Corp*., 794 F.2d 527 (9th Cir.); (''unlike the *electioneering* analysis, we look to Picazzo's *actual duties*. When considering *Chicago Metallic's treatment* of Picazzo, the perceptions of other employees are irrelevant'') (emphasis added).

I conclude, as a matter of law, that a finding of statutory supervisor, within the meaning of Section 2(11) of the Act, *must be based* on ''primary indicia,'' i.e., those functions actually listed in Section 2(11) of the Act, *PHT, Inc*., 297 NLRB 228 (1989), accompanied by the use of independent judgment in the execution or recommendation of any of the Section 2(11) functions, *John N. Hansen Co*., 293 NLRB 63; *Bowne of Houston, Inc*., 280 NLRB 1222 (1986); *Highland Superstores, Inc. v. NLRB*, supra; and that ''secondary indicia'' may only be used in cases where (a) an election has been held and the perception of coemployees is relevant to the issue whether the election should be overturned because of the conduct of the apparent supervisor, regardless of whether the person is a statutory supervisor, *NLRB v. Chicago Metallic Corp*., 794 F.2d 527 (9th Cir.); or (b) in aid of establishing whether the alleged supervisor actually *possesses* any one of the Section 2(11) enumerated statutory functions. It is my understanding of the law that ''secondary indicia,'' standing alone, may not establish the legal the conclusion thatthe possessor of these secondary indicia is a statutory supervisor within the meaning of Section 2(11) of the Act.

Among the ''secondary indicia'' believed relevant in determining whether an individual is a supervisor, *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989), are whether an employee attends management meetings; spends more time ordering others around than actually doing production work; receives a higher wage than other unit employees; wears different colored uniform or other distinguishing clothing; or where an individual, if not a supervisor, creates an unreasonable ratio of employees to supervisors (citations omitted). Yet, the title of supervisor and being the senior employee on the night shift does not create a supervisor, *Central National Gottesman*, 303 NLRB 143 (1991); *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991).

Wages Supervisor Meetings; Absent Employees; Production Responsibilities

In that instant case, Genoveva Tello receives a wage rate of $9 per hour compared to the $4.50 to $6.75 per hour which is the ordinary rate of pay for loom operators (Patricia Lalinde receives $7.50 per hour as the alleged supervisor on the first shift, a status which I precluded Respondent from proving); since 1987, Tello does not ordinarily work on the loom, weaving webbing; rather, her job duties since 1987, at the direction of President Peter Chang, have been fixing machines, helping employees in production, changing the thread color on machines, training new employees. On the other hand, she was introduced to new employees as the second-shift supervisor and some employees, at least, call her supervisor or ''boss.'' There were approximately 17 employees on the second shift and, without Tello being a supervisor, there would be no supervisor over the 17 employees working from 3:30 to 11:30 p.m. (except for the period 3:30 to approximately 5 to 6 p.m. before the office supervisors went home). In addition, Tello (with the intermitant additional presence of the second-shift mechanic) would regularly (once a week in 1988; twice a week in 1989) have meetings with Respondent's chief supervisors, President Chang, Plant Manager Young Park, and sometimes General Manager Kim with regard to production difficulties on her shift. When there were absent or vacationing loom operators, Tello would either substitute herself on their machines or assign nearby employees to operate the vacant machinery.

I credit Lalinde's testimony that in 1989 she attended at least two management meetings with Tello in President Chang's office along with Plant Manager Young Park and (the then) General Manager Jason Park. The subject discussed at the meeting was production and quality. The record also supports the conclusion that while President Chang scheduled production and advised supervisors of that schedule (Tr. 635), Tello alone among second-shift employees, was repeatedly admonished for second-shift quality and notified of customer complaints and returns of merchandise based on size variation in the webbing width (Tr. 611–612). She was given a ruler to check the width of the product (Tr. 612). At production meetings with President Chang, Tello would notify Chang of second-shift production, at least insofar as progess toward fulfilling of incoming orders (Tr. 733).

Tello would be consulted concerning the improvement of production. The recurring problem was to gain greater production in the face of poor quality yarn produced by J.S. Fiber. When Chang complained of low production, Tello would blame the yarn; that employees could not do anything on production when the quality of the yarn was so poor (Tr. 735). While Chang and General Manager Kim admitted the low quality of the yarn, they nevertheless said that increased production could be expected if the employees were better controlled: that the employees were not using their full energies in production and that Tello was not ''supervising'' correctly (Tr. 735). The problem was on *both* day shift and night shift but, according to General Manager Kim, was greater on the night shift (Tr. 736). Tello told them that she had no problems with the employees (Tr. 736). She blamed only the yarn.

In addition to these meetings on production and quality almost on a daily basis, Tello, on behalf of the second shift, would meet President Chang and discuss that day's production. Tello, alone among employees, would also come to the office to obtain supplies, machine hardware and similar materials for production.

Tello was advised of employee lateness or absence by the front office or, if the employee reached Tello to advise of absence, Tello would advise the front office in turn. Tello would then assign the idle looms to the adjacent employee so that production would be uninterrupted. No other em-

ployee on the second shift had such power except the mechanic. The mechanic, also, in case of absence of an employee, could shift employees from machine to machine. As noted, the shift mechanic, a salaried nonsupervisor, regularly attended supervisor meetings devoted to quality and production along with Tello.

Although other employees trained incoming new employees in production on the webbing machines, and although Rosa Chang, as well as Tello and the mechanic, selected substitutes for absent employees on the machines, it apparently was Tello who ordinarily insured continued production on the second shift (Tr. 708 et. seq.). Tello went to each operator on her shift to check how they were doing as part of her regular responsibility (Tr. 254–255) and had the power to stop production if there were machine problems (Tr. 758). Further, Tello regularly spoke to the employees about production and quality (Tr. 273). She apparently also regularly spoke with Patricia Lalinde concerning problems on the first shift which might reoccur on the second shift (Tr. 1255–1257).

Although employees becoming ill on the second shift often told Tello of their illness and told her that they were going home, there is no credible evidence showing that Tello had the independent power to grant the employee time off for that purpose (Tr. 220). Requests for time off were to be made to the office, whether the employee requested directly or through Tello (Tr. 969–970). Employees becoming ill on the second shift also reported to the mechanic and told him that they were leaving (Tr. 221). The evidence, however, shows that employees injured on the job were taken to the hospital only by Tello.

To the extent Respondent would bottom Tello's supervisory status on the authority to grant time off, I find that the preponderance of credible evidence does not support that conclusion. To the extent that General Manger Kim testified that he orally granted such power to Tello, I do not credit his testimony. I regard General Manager Kim's testimony, in general, to be facile and incredible. His testimony was that it was an uncommon practice to grant employees a full day of time off for immigration work permits (Tr. 847) and that he told Tello and Lalinde that they had the power to grant time off when the employees presented him their immigration papers. The evidence shows, however, that while Kim would consult with Tello concerning the wisdom of granting the time off, it was Kim, himself, who entertained and granted the time off (Tr. 847–849). Indeed, if any grants of time off were in writing and contained a description of Tello's participation in the grant of time off, then the written notation thereof should have been produced with regard to proof of the exercise of that power (Tr. 746). *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

With the above observations of Respondent's operation, Tello's functions, and certain powers, privileges and attributes of her employment,[15] I turn to Respondent's other specific positions with regard to the other, distinct 2(11) supervisory powers which Respondent asserts that Tello possessed or exercised.

(a) *The possession of the power or exercise of the power to discipline, suspend, or discharge*

1. The August 24, 1989 memorandum to all employees

As noted in the above statement of facts, a document or memorandum bearing date August 24, 1989, over the signature of the then general manager, Jason Park, was distributed to all employees with their pay checks on or about that date. The subject of the memorandum was the rules concerning *dismissal of workers* and states four categories of conduct relating to dismissal: (1) Absence from work without prior notification and subsequent permission to and from the office. (2) Coming to work late and/or leaving work early without prior notification and subsequent *permission to and from the office*. (3) Refusal to follow supervisor's instruction. (4) Stealing and or damaging of company property.

The memorandum notes that an employee breaking rule (4) concerning stealing or damage to company property ''will be terminated immediately.'' With regard to the other rules, if they are broken more than three times within a year (the employee) will be *subject to termination* from work.

The memorandum also states, inter alia, that Tello was selected as the second-shift *supervisor*. Her responsibilities are to assist (President) Chang and (General Manager) Park in production and the operation of the afternoon shift. The memorandum notes that this position for Tello is a ''new position.'' Nothing in the memorandum suggests that the supervisor may discipline anyone.

Respondent argues that the memorandum identifies Tello as a supervisor and, in combination with the rules set forth, the employees had to follow the supervisor's instructions or be subject to termination. The language of the memorandum ''speaks for itself.'' I do not accept Respondent's argument in so far as it suggests that the document gives ''supervisor'' Tello a power of discipline or even implies such.

In the first place, the first two elements of misconduct (absence from work *without prior notification* and coming to work late or leaving work early *without prior notification*) do not state, as one might expect, that the notification of such conduct would be to the shift ''supervisor.'' Rather, it is quite clear that the employee's notification must be to the *office* in order to excuse absence, or coming to work late or leaving work early. The degree of supervisor participation in dealing with these circumstances (arriving late, leaving early or being absent) is quite clear. There is no participation. In view of General Manager Kim's discredited testimony, that he reminded Tello of her *existing* power to grant time off, it seems remarkable that this memorandum of August 24, 1989 (6 months *before* Kim was hired) did not suggest that the supervisor had any role whatsoever in (even participating insofar as being notified of) an employee application for time off. The memorandum, as noted, directs the employees to

[15] The Board has held that a direction to employees to follow the directions of their ''supervisor'' is not dispositive, *PHT, Inc*., 297 NLRB 228; nor is the monitoring of attendance and the confirming of hours by signing timecards, *John N. Hansen Co*., 293 NLRB 63 (1989), especially where his regular duties are in production, op. cit; nor is a much greater wage or salary; ibid, *Bowne of Houston*, 280 NLRB 1222 (1987), or interviewing prospective employees, ibid. Indeed, in *Cal-Western Transport*, 283 NLRB 453 (1987), and *Bowne of Houston*, supra, the overall power and authority of the alleged supervisor was more formidable than in the instant case. The Board, nevertheless refused to find supervisory status either because the power did not exist or because its exercise was routine, or sporadic or without independent judgment.

geek permission only *from the office* in order to avoid running afoul of the rules concerning absence, lateness, and leaving early. The *omission* of any reference to *supervisory participation* in these functions is noteworthy, not only in terms of evaluations the supervisor's function but, equally important, dealing with the credibility of Kim's testimony in this and other respects.

Furthermore, the memorandum states that multiple violations of any of these three rules (absence, coming to work late or leaving work early without permission; refusal to follow supervisors' instruction) within a year will make an employee ''subject to termination from work.'' This statement hardly suggests that it is the *supervisor* who will cause the termination of the employee for a three-time failure to follow the supervisor's instructions. The memorandum states only that the employee will be ''subject to termination from work.'' I conclude that on the basis of this entirely ambiguous language, it is the ''office'' which retains all the decision-making power to do the terminating rather than the supervisor. The memorandum fails to state that the supervisor has even the power to recommend.[16]

I conclude, therefore, that the August 24, 1989 memorandum (R. Exh. 1), naming Tello to the ''new'' position of second-shift supervisor, itself, constitutes no evidence of Tello's statutory supervisory status and tends to show quite the opposite: that the power to discipline, up to discharge, resides ''in the office'' and not in Tello. Where the memorandum as late as August 1989, had the opportunity to state, or even imply, that Tello herself had the power, or in conjunction with any other party, had the power to discipline, it failed to do so. I conclude, therefore, that the memorandum does not support Respondent's argument that Tello had the power to discipline.[17]

[16] Thus, I agree with Respondent's statement (R. Br. 26, fn. 9) that this company notice, ''stands on its own.'' But counsel nowhere suggests that the memorandum, in any place, states or even implies that it is the ''supervisor'' who has the power to discipline rather than the ''office.'' Certainly, making the employee ''subject to termination'' is hardly enough. Thus, Respondent's witness, Maria Alonis testified that General Manager Kim, in his January–February 1990 speech to employees, infra, said that they should directly tell the office (or have the supervisor tell the *office*) if they wanted time off (Tr. 969–970). Independent judgment in the execution of one of the 2(11) functions (one of the ''primary indicia'') is necessary to support a finding of statutory supervisor status. *PHT, Inc.*, 297 NLRB 228 (1989). Here, Tello was not even a participant in the disciplinary process described in the memorandum, much less was she called upon to exercise independent judgment. The disciplinary power was always in the *office* according to what can be gleaned from the memorandum.

[17] Respondent argues (Br. 28) that because, starting as early as 1988, General Manager Jason Park told the loom operators to tell their ''supervisors,'' including Tello, of problems they could not handle on their own looms, this creates supervisory status. The fact that Tello, the most experienced and perhaps the most intelligent employee on the second shift, having particular experience in the operation of the looms, could solve other employees' problems does not suggest the existence of a 2(11) function exercised with independent judgment. To the contrary, Tello's expertise fits the nonsupervisory function fully described in *Southern Bleachers & Printworks*, 115 NLRB at 791. Similarly, Kim's instructions to employees that they notify the supervisors (Lalinde, Tello) whenever they were going to be absent or late or leave the production floor does not suggest supervisory status. This is a matter of mere notification rather than employees' seeking Tello's permission to leave or to be absent. As above noted, the employees knew that their obligation was to notify the *office*, directly or through the supervisor (Tr. 969–970).

2. Testimony concerning Kim's 1990 speech regarding Tello's authority to discipline

Sometime in late January 1990, perhaps following Tello's unsuccessful bargaining on her pay, and benefits with the Changs, she asked the newly appointed general manager, Eric Kim, to hold a meeting with employees wherein, inter alia, Kim would define Tello's employment status with Respondent vis-a-vis the employees. She wanted the employees to know who she was and where she stood in the Company (Tr. 544). Within a week, such a meeting was held, with Kim speaking in English and the office clerical, Carol (Algeria) Wolford translating into Spanish for the employees.

Thus, in late January or early February 1990, all the Ribbon Sumyoo employees were gathered in the lunchroom. Young Park introduced Eric Kim as the new general manager. Kim told the employees that he understood there were low production and quality problems which led to customer complaints; that at least part of the problem was the quality of the yarn they were receiving from J.S. Fiber but he urged them to work harder to overcome that problem and assured them that the quality of the yarn would improve. He then identified the supervisors in Ribbon Sumyoo (Tr. 694). He told them that Patricia Lalinde was the morning-shift supervisor and Genoveva Tello the second-shift supervisor. He also identified the two ''line leaders'' from each shift (Tr. 695). Kim testified that he ''also talked about the authority or the power of the supervisor because that was one of the reasons we did hold the meeting'' (Tr. 695). Specifically, Kim said he told the employees that the supervisor's instructions were to be followed and that employee disobedience to those instructions would be dealt with by termination and that the authority for termination was given to the supervisors (Tr. 695). He went further; he said he told the employees that refusal to follow the supervisors' instructions could lead to termination by the supervisor ''on the spot'' (Tr. 696). Employee Maria Alanis, called by Respondent, corroborated that she heard Wolford say at the meeting, that the supervisors (Lalinde and Tello) ''could discharge us whenever they saw we were doing something wrong'' (Tr. 968). Carol Wolford also corroborates Kim's testimony. She testified that he said (and she told the employees in Spanish) that if the employees ''give [the supervisors] any problems, they have the authority to dismiss you.[18]

Maria Estella Lopez, a credible witness, testified that other members of her family work for Respondent, that she had known Rosa Chang (wife of President Chang) a long time, and herself succeeded Genoveva Tello as supervisor on the second shift on August 2, 1990. Testifying as a Respondent witness (Lopez was earlier called as a General Counsel witness), Lopez, asked about Kim's speech to the employees, affirms, and Tello agrees, that Tello was mentioned by Kim as a supervisor (Tr. 485). Respondent, however, did not seek

[18] I note that Wolford contradicted Kim with regard to whether, at the end of his speech, there were any employee questions. Wolford testified that Kim specifically asked the employees if they had any questions and that the employees presented no questions to him (Tr. 546). On the other hand, Kim twice testified that the employees asked questions about yarn (Tr. 695 and 696).

to establish, through the testimony of its own, present supervisor, Lopez, that Kim described Tello as having the power to terminate or discipline employees. Genoveva Tello, herself, called in rebuttal, denied that Kim *said* that either she or Lalinde had the authority to dismiss employees (Tr. 1250–1251).

Evaluating the credibility of Kim's, Alanis', Wolford's, Tello's and other witnesses' testimony concerning Kim's January–February 1990 speech to all employees regarding whether he mentioned any Tello power to discharge or discipline employees, and in the face of Tello's denial and Lopez' failure to testify on the point, I regard the testimony of Patricia Lalinde[19] to be determinative of what Kim said of her and Tello's power to discipline.

First, she testified expansively that, at this January–February 1990 meeting of employees, Kim stated that she and Tello had ''the authority and power to make any decision with regard to any problem, whether related to an employee or to our work'' (Tr.886–887); and that Kim told the employees that ''they had to follow whatever orders we would give them'' (Tr. 887). In her later response to an openly leading question, whether Kim said anything about the authority to ''let somebody go,'' Lalinde testified that she had no recollection of anything else being said (Tr. 887). Thereafter, Lalinde testified only that Kim told the employees in that meeting that ''they should follow my orders or else *they would face the consequences* which could be a suspension or being fired'' (Tr. 888) (emphasis added).

I do not credit Kim's testimony generally, and I specifically do not credit his testimony concerning this meeting in which he allegedly said, and Wolford translated, that the supervisors, and in particular Tello, had the power to discipline or discharge employees ''on the spot'' if they failed to follow Tello's instructions. Similarly, with regard to the testimony of Wolford and Maria Alanis, as corroborative of what Kim said concerning Tello's (or Lalinde's) power to discipline for failure to follow supervisor's instructions, I do not credit their testimony. Rather, noting the failure to inquire of corroboration from the testimony of a witness like Maria Estella Lopez, and noting Tello's denial, I credit the testimony of Patricia Lalinde.

As I have previously observed, I was impressed that Lalinde was devoted to Respondent and appeared anxious to support Respondent's cause. Had Kim's speech included a statement, or Wolford translated, that Lalinde (or Tello) had the actual power to discipline or discharge employees for failure to follow instructions, whether exercised ''on the spot'' or otherwise, I am confident that Lalinde, in particular, would have recalled such a grant of authority from the new general manager. Instead of corroborating Kim, Wolford, et. al., that Kim said that Lalinde and Tello had the power to discharge employees ''on the spot,'' Lalinde testified only that Kim said that if an employee failed to follow Lalinde's orders ''they should *face the consequences* which would be a suspension or being fired.'' Nothing here of Lalinde (or Tello) having the power to discharge or suspend or otherwise discipline any employee for any reason or even to recommend same.

Lalinde's testimony (Tr. 888) that a failure to follow her orders could lead to the vague ''consequences'' of the offending employee being suspended or fired is thus wholly consistent with Respondent's May 24, 1989 memorandum to all employees concerning employee obligation to follow supervisors' orders and the circumstances under which employees could be discharged. Lalinde's testimony, like the August 24 memorandum, discloses no power or even participation in the supervisors to discharge or discipline employees. Those powers, like the power to grant time off, supra, are reserved ''to the office.''

Discrediting the testimony of Kim and Respondent's corroborating witnesses, and crediting the testimony of Tello and Patricia Lalinde, I conclude that Kim, at his January–February 1990 speech, did not tell Respondent's employees that, inter alia, Tello had the power of discharge or of any other discipline for failure of the employees to follow Tello's orders.

3. Kim's testimony regarding Tello's power to discipline employees other than at the January–February 1990 meeting

Kim also testified that in late January 1990, on two or three occasions in a period of a week or 10 days (Tr. 699) before he spoke at the late January, early February employee meeting, be told Genoveva Tello that she not only had the power ''to carry on business, production, . . . or quality'' (Tr. 697–698), but that she had the authority ''to terminate employees for not following instructions and also to control her subordinates, her workers on her shift. Control her workers. We talked about those things'' (Tr. 698). Tello denied that Kim had such conversations with her (Tr. 1325–1326). In particular, she denied that Kim told her she had the authority to carry on business production and quality; or had the authority to discipline workers. I have already noted my general reluctance to credit Kim's facile testimony. It is not credible that Kim said that Tello, herself, had the power to terminate employees. On the basis of the above analysis concerning Kim's credibility and in view of Tello's denial of such conversations with Kim, I credit Tello's denial and discredit Kim's testimony.

4. The testimony of Young Park concerning Tello's authority to discipline employees

Park testified that at a meeting sometime in late 1989 relating to product quality, he told a meeting of all employees (at which Lalinde and Tello were present) that if they did not listen to the supervisors, ''they got to listen. They follow the supervisor, right? and that is about it'' (Tr. 1475). He told the employees that they had to continually remain aware of quality and consistently check the size of the product. In particular, they should not discard as garbage otherwise useful material (Tr. 1475). Finally, Park recalled that he told the employees not only that they had to follow the supervisors' instructions, but that if they did not, the supervisor could ''dismiss the person or whatever'' (Tr. 1476).

Quite rightly, Respondent observes (R. Br. 29) that Park's testimony on this point is unrefuted on the record. Nevertheless, I do not credit Park's testimony. While it was not re-

[19] At the time of her testimony, called by Respondent, Lalinde had become a salaried employee and was still in charge of the first shift. She was, as I observed her, understandably anxious to give testimony in support of Respondent's position.

futed, it was also not corroborated by, though aimed at, Lalinde who was present at the meeting. My observation of Patricia Lalinde, a devoted employee was that she was desirous of testifying in support of Respondent's case. Had any Respondent's supervisory hierarchy told her, at any time, that she possessed the power to discipline, much less to discharge, any of the employees on her shift, she would remember it with alacrity and show no reluctance in revealing the circumstances surrounding its grant. I do not to credit Park's testimony that, in the presence of Patricia Lalinde and Tello, he told employees that Tello and Lalinde had the power to discipline or dismiss employees if they refused to follow their instructions.

5. General Manager Kim's testimony concerning Respondent's management meetings and Tello's presence

Eric Kim testified at length concerning management meetings in President Chang's office. Regularly present were President Chang, Plant Manager Young Park, the accountant, Office Manager Wolford,[20] and himself from time-to-time. Also present was Tello when the meeting concerned the afternoon shift; Lalinde when the meeting related to matters concerning the morning shift.

Production, quality, customer complaints, the return of defective webbing and the schedule of shipping of specific orders were always discussed. The supervisors reported on the progress of production and quality. In these 15- to 20-minute meetings, occurring up to Tello's April 12 discharge, one subject that was always discussed was the chronically poor quality of the yarn which led to chronically poor production. According to Eric Kim, he and President Chang would consistently take the position that the poor production was due to the supervisors' failing to cause employees to put all their energy into their work rather than exclusively to the poor quality of the J.S. Fiber yarn. Tello would always take the position that it was not an employee problem but solely a yarn problem (Tr. 736). In addition, to these meetings, the supervisors on a daily basis, would discuss production operations with President Chang (Tr. 373).

It must be observed that in none of these twice-monthly meetings which occurred as late as in January–April 1990, with Tello blaming the quality of the yarn and President Chang and General Manager Kim blaming the quality of Tello's supervisory functioning, is there a suggestion from any of Respondent's witnesses that either Kim or President Chang ever told Tello that she could use her power of discipline, including discharge (which she allegedly already possessed) as a tool or a goad to cause the employees to put their energy into the work. Kim's only testimony was that he and President Chang were in continual dispute with Tello concerning poor production. There is no statement to Tello that she had the power to discharge employees who did not put their ''energy'' into their work (Tr. 735). If, as Kim testified, the reason for poor production was predominantly because ''supervision is not done correctly'' (Tr. 735), it appeared to me significant that in none of these conversations did either President Chang or General Manager Kim, or anyone else, explicitly remind or confront Tello: that Tello was not a good supervisor because she was not weeding out, threatening, or disciplining employees who were not performing well and putting ''their energy'' into production. Had Tello possessed such a power, certainly after Kim's January–February speech to employees (Tello's power to discharge ''on the spot'') such a statement would undoubtedly have been mentioned in the six or more production meetings where President Chang and General Manager Kim confronted Tello with the poor production on the second shift caused, in large part, they said, by Tello's failure to fully function as a supervisor.

6. Tello's exercise of the power to discipline or to terminate employees

(1) The March 17, 1990 discharge of Narcissa Pedraza Ramierez

Tello testified that although she was never instructed to do so, she observed the production at the looms because President Chang would tell Tello, from time-to-time, that he knew how much was being produced by each machine per hour during an 8-hour period. Although, according to Tello, President Chang's estimates of production were not entirely accurate, she watched production because she sought to discover how he might have calculated the amount of product being produced during the 8 hours (Tr. 1283–1284). She testified, however, that she never reported to President Chang or Rosa Chang that an employee's production was low (Tr. 1285). This Tello sweeping denial was incorrect. Although she did not recommend, in 1988 or 1989, that low-producing Emilia Cardenas be terminated, she did report the low-production situation and suggest or recommend to Peter Chang that Cardenas be transferred from loom operator to the cutting machine (Tr. 232) and the transfer was made. Chang, however, made the decision on Tello's report and recommendation. This matter is treated in greater detail hereafter.

Narcissa Pedraza had been employed, by March 17, 1990, for about a year as a loom operator on the second shift. About 1 month before her March 17 termination, while Tello was in President Chang's office apparently discussing production, Chang spoke of Pedraza's low production and told Tello to speak to Pedraza to determine what her problems were. Tello agreed to speak to Pedraza (Tr. 1304). About 2 weeks after President Chang spoke to Tello, Rosa Chang entered the work area and asked Tello what was going on with Narcissa Pedraza; that her production continued to be very bad. Tello told Rosa Chang that they should go immediately to Pedraza and ask her about her problem. They both then visited Pedraza (Tr. 1304–1305).[21] Neither President Chang

[20] Wolford said she was seldom present, Tello testified Wolford was never present.

[21] Corporate Secretary-Treasurer Rosa Chang and her husband, Peter Chang, are 50-percent owners of Respondent. She maintains an office in Respondent's plant and testified that prior to the April 12, 1990 discharge of Tello, she was mostly involved in purchasing (Tr. 1123–1124); prior to and in 1987, that she spent most of the day fixing machines, speaking to employees about social matters, and threading the weaving machines (Tr. 1125). She was, however, also particularly interested in the attempted unionization of the employees (Tr. 416–417) and, contrary to her testimony (Tr. 1138; 1143–1144), she (rather than Tello) entertains from and grants to second-shift employees their requests for time off and leaves of absences, although petitioning employees are sometimes accompanied by Tello (Tr. 503,

Continued

nor Rosa Chang denied this Tello testimony and I credit such testimony on this progression of events leading to the termination of Pedraza. Pedraza then told Tello and Rosa Chang that she was trying her best but that the quality of the yarn was the problem (Tr. 1305). Rosa Chang told her that Respondent was upset with her production but that she should keep working. Tello translated Rosa Chang's English into Spanish for Pedraza.

Sometime after this conversation, in late February or early March 1990, and before her March 17 termination, Pedraza asked her ''line leader,'' Maria Estella Lopez (the ''line leader'' on the second shift who, like Tello, trains new employees on the looks (Tr. 498)) to accompany her on a visit to the front office to speak with Rosa Chang. On that visit to the front office, Pedraza asked the line leader to tell Rosa Chang that she (Pedraza) was trying to do her work; and that any claims to the contrary were false (Tr. 1410–1411). On March 17, 1990, office clerical Wolford, over the factory intercom, summoned both Tello and Pedraza into the office at about 4:30 or 5 in the afternoon (Tr. 1308). This occurred about a week after Rosa Chang and Tello had spoken to Narcissa (Tr. 1307).

With office clerical Wolford seated in the office about 6 or 8 feet away, General Manager Kim asked Tello to tell Pedraza that he was told that she had low production. Pedraza said that she had already been twice told of her low production (Tr. 1309). Kim told Pedraza (through Tello, speaking in Spanish) that he was going to give Pedraza one more week as an opportunity to improve her production; that she should work hard and that if her production improved during that week, Respondent would not fire her. If her production remained low, they would fire her (Tr. 1309).

Both General Manager Kim and office clerical Wolford testified quite differently regarding this event: that Tello voluntarily arrived in the office, told him that she did not think Pedraza was ''going to make it'' (Tr. 720). The first thing that Wolford recalled, admitting that she did not pay attention to the conversation at the beginning (Tr. 593), was that Kim asked Tello: ''Are you sure about this'' and Tello said that she was (Tr. 593). Kim then says that he asked Tello whether there was anything that they could do to help Pedraza and that Tello recommended that they speak to Pedraza. Wolford says that at this point Kim asked her to call Narcissa into the office and said she did so over the intercom. I do not credit that Tello gratuitously came to the office to report against Pedraza; that Kim asked Tello for advice as to what to do about Pedraza and I do not credit his testimony that Tello recommended that they speak to Pedraza. Certainly Wolford's testimony (Tr. 593) does not include corroboration that Kim asked Tello whether they could do anything to help her nor Tello's suggestion that they call Pedraza in.

Whereas Tello testified that Kim directed her to tell Pedraza that ''he had been *told*'' that Pedraza's production was low (Tr. 1308–1309), Kim and Wolford testified (Tr. 721; 593) that Kim said: ''*Genoveva* [Tello] tells me that your production is low.'' According to Wolford, Tello translated this as: ''Mr. Chang says your production is low'' (Tr. 593). Wolford testified that this Tello mistranslation caused her to pay attention to what was going on (Tr. 593).

In resolving this particular contradiction in the testimony, because of Kim's overall lack of credibility, indeed, lack of veracity, and Wolford's self-interest in testifying on behalf of Respondent, and notwithstanding Tello's self-interest in her own testimony, I would ordinarily credit Tello. I find, however, that a resolution of this contradiction is not material. The fact, based on uncontradicted evidence, is that both Peter Chang and Rosa Chang complained to Tello of Pedraza's low production. Indeed, Rosa Chang and Tello visited Pedraza and mentioned Respondent's unhappiness with Pedraza's low production. In addition, Pedraza, accompanied by her line leader (Lopez) visited the office to speak with Rosa Chang concerning the repeated assertions of her low production and Pedraza's attempt to remedy that. This visit occurred within about a week of her March 17 termination. Thus, whether or not Tello was seeking to establish the facts,

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525). Rosa Chang's evasive testimony, that the employees telephoned her rather than coming directly to her requesting time off (even after Tello was allegedly made a supervisor in July 1987) is therefore not credited. Similarly, Rosa Chang's categorical denial of her (rather than Tello) choosing employees for working overtime was clearly contradicted by one of Respondent's own witnesses, Rosa Chang's long-time acquaintance and, at the time of her testimony, an apparent supervisor (Tr. 525). General Manager Rim testified (Tr. 664)—and I have already generally discredited him—that Rosa Chang was not involved in the hiring or scheduling of employees. Yet the credited, uncontradicted evidence also shows (Tr. 1156–1158) that Rosa Chang, as late as March 1989 (almost 2 years after allegedly relinquishing all her supervisory duties), interviewed a prospective employee, supervised the execution of the application, and told her she would be informed of actual hiring. When the prospective employee (Luz Maria Garcia) first arrived at Respondent's office to apply for the job, she was met by office clerical Wolford who, having notified Rosa Chang of the applicant, played no further role in the hiring process; only Rosa Chang did (Tr. 1156–1159). Nor did Tello play any role in the hiring this second-shift employee (Tr. 1160).

In addition, Rosa Chang testified that after mid-1987 (when Tello allegedly first became a supervisor) she *never* gave Tello instructions on how to conduct operations on the second shift (Tr. 1134). On cross-examination, however, she admitted giving employees instructions through Tello even after July 1987. In redirect examination, she returned to her original denial, but testified that she merely infrequently ''relayed'' messages from President Chang to Supervisor Tello (Tr. 1151). This later testimony was the result of a leading question. Lalinde's testimony (Tr. 897–898) that ''once in a while, ''Rosa Chang'' . . . took a look at the workers'' is indicative of her continued interest.

With regard to overall credibility, I found that Rosa Chang's testimony concerning her ownership of the Company, for instance, to be evasive and unbelievable. She denied being ''an owner'' of Respondent (Tr. 1146) although General Manager Kim had already identified her as being a 50-percent owner of Respondent. I noticed her pause before she answered the question concerning her ownership. When pressed on the point, she said she paused because she did not know the details of her position as a part owner. When pressed further with the question whether she did not know that 50-percent ownership of the business made her ''an owner,'' she testified she did not know (Tr. 1147). Such testimony cannot be accepted from a person of Rosa Chang's intelligence, experience and business acumen. She then retreated to the position that she had ''signed the paper, but I didn't read the whole thing so I just don't know'' (Tr. 1147).

I find that it was Rosa Chang rather than Tello who hired employees and chose employees for overtime work and, contrary to her and other testimony, she had, and continues to have, a direct interest and responsibility (as a corporate officer and owner) in employee wages, hours, and conditions of employment.

of Respondent's displeasure with Pedraza, rather than support Kim's apparent attempt to put the onus on Tello for *reporting* Pedraza's low production, is essentially irrelevant. Wolford bristled at Tello shifting the onus, truthfully, on to President Chang, whereas Tello never reported or complained of Pedraza's production to either of the Changs (Tr. 1317). Nor does Respondent offer any testimony that she did. In addition, at the hearing, Kim and Wolford had a specific interest in shifting the focus of *who* caused and *who* reported the low production, onto Tello's shoulders. Their interest was to show Tello's supervisory conduct in *making* the report.

Thus, even if Tello switched Kim's statement from ''Genoveva tells me that your production was low'' to ''Mr. Chang says your production is low,'' as Wolford testified, Tello would be reflecting the actual fact. Again, there is no suggestion, on this record, that Tello ever reported Pedraza's low production to either President Chang or Rosa Chang or any other supervisor before she entered the office with Kim on March 17 and thus then no reason or precedent[22] prompting her to enter the office to so report on Pedraza to cause her discharge. I specifically have discredited Kim's testimony that Tello told him, at the outset of their conversation, that she did not believe that Pedraza was ''going to make it.''

In short, therefore, I conclude (1) that, crediting Tello, Tello translated Kim's direction accurately, that she told Pedraza that Kim had *been informed* that Pedraza's production was low. This is consistent with both President Chang's and Rosa Chang's complaints of this matter and there was no suggestion on this record that Tello, at any time, told any supervisor, including Kim, prior to this day, that Pedraza's production was low. That the Changs asked Tello to discover the cause of Pedraza's low production is no basis for a sudden gratuitous report by Tello to Kim. (2) Further, I conclude that even if Tello switched the translation so as to state that it was ''Mr. Chang'' who said that Pedraza's production was low, I find that such a switch is immaterial because the alleged misstatement is wholly consistent with the underlying facts based on wholly uncontradicted evidence in this record. (3) In any event, even if Tello told Kim, at the outset of the conversation, that she did not believe that Pedraza was going ''to make it,'' such a statement was a reflection of the Changs' specifically directing Tello to keep an eye on Pedraza's production. having done so, any such report to Kim, if made, would not support a conclusion that Tello regularly monitored and reported to Respondent on employee production; rather, it would have been Tello broadly interpreting the Changs' direction to make a report.[23] Wolford could not remember Tello reporting on any other employees (Tr. 597–598). Consequently, under any view, Tello's participation in their type of transaction was unique for her.

Whereas Tello testified that Kim *told her* that Respondent was going to give Pedraza the opportunity of working a further week in order to improve her production and then would consider firing her if her production did not improve, Wolford and Kim testified that Kim *asked Tello* what could be done in the face of Pedraza's continued insistence that the fault was in the quality of the yarn. Kim (according to Kim and Wolford) asked Tello for a recommendation of what to do, suggesting giving her a week's trial. Tello, according to Wolford, said: ''Yes, we can try.'' I credit Tello. At this point, I find that Kim, reflecting the Changs, was not asking Tello's opinion. He was telling her of options.

Tello then testified that Pedraza said that she had worked as hard as she could and not work any harder. Tello further testified that at this point, Kim gave her a letter, already prepared and typed (R. Exh. 4) which Tello read in Spanish to the illiterate Pedraza. Thereafter, Kim said, and Tello translated, that Respondent would give her a further week and that she should try in the further week. Tello recalls that Pedraza said she wanted to quit right then and wanted to sign the termination letter because she was no longer interested in remaining. Tello told her not to quit, not to sign the letter but to continue to work because she was given one more opportunity. Pedraza corroborates Tello. Pedraza again refused and Tello told her that that was her decision and that she should sign the letter.

Wolford recalls that in this conversation, Kim said that they would, in the trial of 1 week, retain Pedraza ''depending on what Tello evaluates her production to be'' (Tr. 594). I do not credit this Wolford testimony. Wolford further testified that Tello mistranslated this[24] into: ''he wants to know if you want to stay until next Friday or leave now'' I also do not credit this Wolford testimony. I do go because where Wolford specifically denied that Tello said *anything* about Pedraza *trying harder* (as an alternative to being terminated) (Tr. 595), Pedraza testified quite to the *opposite* (Tr. 1403): that *Tello* told her to work faster and move faster. On the basis of this contradiction by Pedraza, whom I observed to be an ingenuous, unconcerned, and unsophisticated witness, I discredit Wolford and credit Tello's version.

In any event, there is no dispute that Pedraza then signed the termination memorandum (R. Exh. 4) with Tello signing in the space marked ''supervisor.'' Kim testified that her signature appeared there without comment. Tello testified that she refused to sign the document asking why she had to sign it. She said that Kim told her she was the supervisor and was required to sign the letter (Tr. 1313). Tello says that she then told him that she was not firing any of the employees but Kim told her she had to sign. She then signed the letter, first showing it to Pedraza and telling her that she had to sign the letter.

I do not credit Wolford's further testimony that Tello told Pedraza, before she left, that the yarn would not improve so that Pedraza might just as well leave that day and that she then told Kim: ''she wants to leave today.'' Such testimony is wholly inconsistent with Pedraza's testimony that Tello urged her to stay. I further do not credit Wolford's testimony that Tello said nothing about her supervisory capacity in signing the memorandum of Pedraza's termination.

There is no dispute, however, that after Pedraza and Tello left the office, after Pedraza signed the termination letter, that Wolford told Kim that Tello's translation had not been correct and that Kim told Wolford to have Pedraza return to the

[22] The above-noted Cardenas matter was a report and recommendation of a transfer in order to keep the employee in employment.

[23] Kim, admittedly not ordinarily involved in production matters, had not been involved in the Pedraza matter and it is odd that Tello would have reported to him. She did so only because Kim called her into the office. Kim's involvement, I find, was based on directions from the Changs. Thus, Kim called Tello into his office; Tello did not voluntarily enter.

[24] I find that that is what Kim actually said.

office which she did. Kim, using Wolford as the Spanish translator, said nothing to Pedraza about any mistranslation but merely asked whether Pedraza had understood what was in the letter she signed. Wolford said that she urged Pedraza to try harder but Pedraza refused, telling Wolford that there was too much constant ''checking'' and that it was better for her to sign the termination (Tr. 1453). Wolford's testimony omits any reference to Pedraza's refusing to remain for the trial week (compare: Tr. 597 with Tr. 1405). There is no suggestion on the record that *Tello* had done any ''checking'' of her work and Pedraza's reference clearly was to the Changs' dissatisfaction with Pedraza's performance.

The gist of Respondent's testimony, through Wolford and Kim, is directed to the assertion that it was Tello who initiated, recommended, and participated in the termination of Pedraza. (1) I have already discredited Kim's testimony, that Tello came to him on March 17 and reported that Pedraza was ''not going to make it.'' (2) Further, I do not find that Tello caused this Pedraza interview rather I find that it was Kim who initiated the Pedraza interview and the subsequent sequence of events; that he was acting at the direction of the Changs; that the Changs were dissatisfied with her low production; that Tello was called to the office to translate for Kim and to translate the offer of the option of improving production in a trial week or being fired; (3) that it was Kim, rather than Tello, who at this time originated the idea of a further trial week because Tello had urged the same course on President Chang a month before; that Tello merely agreed with Kim that there might be a further trial period of a week in which Pedraza's production could improve; that this was accurately translated to Pedraza who refused and elected to accept termination; (4) that Wolford's testimony that Tello failed to urge Pedraza to try harder and accept the offer of a further week as a trial period, contradicted by Pedraza's testimony, was not credible, further undermined Wolford's credibility. It established a motive in Wolford to support Respondent's theory that Tello was decisive in making the recommendation that Pedraza be terminated. The incident, taken in whole, fails to demonstrate that it was either Tello's effective recommendation or decision to terminate Pedraza; and that her signature as supervisor on the termination document (R. Exh. 4), whether made under protest or not, is not indicative of her exercising supervisory disciplinary power under Section 2(11) of the Act. Certainly there is no demonstration of Tello exercising independent judgment in any recommendation or decision regarding the discharge of Pedraza, *PHT, Inc*., 297 NLRB 228 (1989). The decision of granting Pedraza a further trial week or discharging her was Kim's and was made before Tello and Pedraza entered Kim's office. Indeed, I conclude that Kim, not ordinarily involved in production problems, was not the responsible party. He was following orders from the Changs.

To the extent Respondent states that Pedraza's testimony *specifically denied* (Respondent's emphasis, Br. 22) that Tello, accompanied by Rosa Chang, talked to her about her level of production, counsel is quite mistaken. For Pedraza did not specifically deny Tello's testimony; her answer was merely that she did not remember (Tr. 1407). Likewise, whereas Respondent would wholly discredit Tello's credibility because her prior affidavit, taken during investigation of the unfair labor practice allegations, is silent on Rosa Chang's participation in the sequence leading to the termination of Pedraza, that credibility issue, in my judgment, was settled by Pedraza's own testimony (relating to her visit to the office with line leader Lopez to confront and contradict the Changs' prior inquiries into her low production) rather than by any omissions in Tello's pretrial affidavit. I also do not regard Pedraza's testimony that Tello was already in the office when she arrived as establishing the fact that Tello long preceded her and engaged in the conversation Kim (and Wolford) described. I have found Wolford summoned them at the game time.

To the extent that Tello's prior affidavit refers to ''the owner,'' rather than to Kim, as the participant in the March 17 termination of Pedraza, an inaccurate description on which Respondent prominently relies (R. Br. 22–23), I do not regard that description as a significant contradiction. To the extent that Respondent, on cross-examination (Tr. 1376), brought out further details of Tello's February office conversation about Pedraza with President Chang that supports, rather than refutes, a finding that Tello, in the Pedraza termination, did not effectively recommend or make the decision to discharge Pedraza. For, as Respondent's cross-examination showed, President Chang not only told Tello (as she testified) to keep an eye on Pedraza's low production because Respondent was dissatisfied with that low production, but, indeed, he threatened to fire her (Tr. 1376–1378). Tello, in that conversation, asked President Chang to give Pedraza another chance, and President Chang acquiesced therein, especially because Pedraza was friendly with Tello. It is highly unlikely, therefore, it seems to me, that Pedraza would then become the moving force in gratuitously coming into Kim's office, telling him, in substance, that Pedraza was ''not going to make it.'' This background further supports the proposition that Tello was not a supervisor; that President Chang, already having made the threat to fire Pedraza, and there being no improvement in about 2 weeks, Tello was called into the office merely to affirm Kim's (the Changs') decision to fire her (the papers were already typed up) or to seek a method by which the firing could be avoided. In February, Tello had mentioned a 1-week improvement period to Chang. On March 17, Kim repeated it. I conclude that Tello did not recommend or effectively recommend or make the decision in the termination of Pedraza.

Although, for instance, the omissions and inaccuracies in Tello's prior affidavit cited by Respondent, contrary to Respondent's argument, do not impress me as significantly undermining Tello's testimony, I have independently noted other examples of Tello's testimony which were hardly impressive for credibility purposes. In support of her desire to show relative insignificant status, I have noted her incorrect testimony concerning Eric Kim's presence at production meetings (Tr. 1345–1346); her evasive testimony concerning the nature of the Changs' orders to her for delivery to the employees (Tr. 226–227); her evasiveness as to her between-shift meetings with Lalinde on production problems; who called employee meetings and whether she led the meetings (Tr. 273–274); her evasiveness in who told her of first-shift production problems (Tr. 275–276); whether she ever reported an employee's low production, supra, and how often the Changs asked her opinion on employee applicants for employment on the second shift (Tr. 1303–1304). It is clear that, in dealing with and communicating with second-shift personnel and Respondent's desire to increase production, the

Changs relied on and used Tello as their conduit. She was the one reliable and vital instrument in dealing with the Spanish-speaking employees notwithstanding the responsibilities of the shift mechanic. Viewing the record in its entirety, however, and giving due regard to my direct observation of the demeanor of the witnesses as they testified, along with the inherent interests of witnesses and their susceptibilities to these interests in the testimony, I have generally credited Tello and have discredited Respondent's witnesses. With regard to Wolford, the Changs and Kim, that decision was often not difficult. On the other hand, I have generally credited the testimony of both Rosa Chang's long-time acquaintance, currently an apparent supervisor and former line leader, Maria Estella Lopez, and its alleged supervisor, Patricia Lalinde. I realize that Maria Alanis, a Respondent witness, supported Kim's and Wolford's testimony that in Kim's January–February 1990 speech, he described Tello as having the authority to ''fire us'' if the employees were not doing their jobs or if they saw something going wrong with the jobs (Tr. 967). On the other hand, her testimony, consistent with Respondent's August 24, 1989 memorandum (R. Exh. 1) regarding Tello's ''supervisory'' position, demonstrates that requests for time off, among other things, were reserved to the office in terms of *who* had the authority to grant the time off. Similarly, I am fully aware that Salvadore Arreguin, a witness friendly to Tello, did not testify, in rebuttal, concerning Kim's January–February speech. Nevertheless, taking these matters into account and viewing the record as a whole, and discrediting certain of Respondent's witnesses' testimony (including that concerning other alleged Tello supervisory powers) have continued to credit Tello, Lopez, and Lalinde (Respondent's witnesses) and certain other of the General Counsel's witnesses.

(2) A further instance of Tello's exercise of alleged power to terminate employees

Lastly, President Chang testified (Tr. 1023 et seq.) of the discharge of a new employee in the or fall of 1988. He testified that Tello suggested that the person should be terminated and that is what occurred (Tr. 1023). For purposes of this case, I shall ignore the remoteness of this event. Tello denied any such action.

Tello testified that in late 1988 or early 1989, Rosa Chang told her that an employee ''Herminina'' was a slow producer. A few days later, in Rosa Chang's office, both President Chang and Rosa Chang called Tello into the office to translate the firing of this machine operator who had been working for Respondent only about 1 month (Tr. 1318–1319). Rosa Chang told Tello to tell Herminina that she was a very slow producer and that it was not advantageous for Respondent to keep her. Rosa Chang said that both she and President Chang had decided to fire her. When Herminina asked for another chance, the Changs refused and told her to go home. Rosa Chang then directed Tello to take the employee to Wolford to give her a paycheck. Tello denied ever telling anyone that Herminina's work was slow.

I conclude on the basis of all of the above testimony that Respondent has failed to support its burden to prove that Tello had the power to effectively recommend discipline, including discharge, or had the power herself, or exercised any such power. Furthermore, I separately find that, in any event, Respondent has failed to prove that Tello utilized independent judgment in exercising any such power. In any event, a solitary or two instances of discipline are not sufficient to confer supervisory status as a matter of law. *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir.); *NLRB v. Bearer Transfer & Storage Co*., 678 F.2d 679 (7th Cir. 1982).

(b) *Tello's alleged authority to transfer employees*

Among the primary indicia of supervisory status is the authority, in the interest of the employer, to transfer employees where the exercise of such authority is not routine but requires the use of independent judgment.

Respondent concedes that there is no direct evidence that employees were told that Tello had the authority to ''transfer'' or ''reward'' them (Br. 30). The parties appear to be in agreement that the only instance of Tello exercising the power to transfer occurred sometime in 1988 or 1989 affecting the employment of Emelia Cardenas (Tr. 232; 1025). Cardenas worked on the night shift apparently on the looms. Tello testified that Cardenas was having trouble with production; that she (Tello) discussed this low production with Peter Chang that she recommended moving Cardenas to a job as a cutter; and that that occurred (Tr. 232). I conclude, however, that the evidence is unclear on whether she recommended the transfer or acquiesced in President Chang's decision to transfer. President Chang testified that Tello approached him, told him that Cardenas should be *terminated*, but Chang refused saying that it was against Respondent's policy to terminate an employee (Tr. 1025–1026).[25] He said he told Tello that even though Cardenas was a slow employee, she could still work in the cutting department because the work there was much slower (Tr. 1026).

Respondent argues that these facts demonstrate an instance of Tello effectively causing the transfer of the employee into a job in which she remained employed (Tr. 233). The General Counsel argues (Br. 21) that Chang himself made the decision to transfer the employee (Tr. 1025–1026).

I find that Tello reported to President Chang that an employee's production was slow. Further, I shall assume, arguendo, that Tello said, as Chang testified, that the employee should be terminated. President Chang refused to terminate the employee. As above noted, Tello was thus reporting to Chang on low-producing employees, contrary to her denial (Tr. 1285). This shows that Tello possessed no power to effectively recommend the discharge of an employee in her own second shift even for slow production.

The evidence then becomes ambiguous: on the one hand, Tello said that she recommended moving Cardenas to the cutter job and that this was done (Tr. 232). On the other hand, Peter Chang testified that he not only refused to terminate the employee, as Tello recommended, but that *he told Tello* that, despite Cardenas' slow production, she could work in the cutting department because the work is slower in that department (Tr. 1025–1026). Tello, according to Chang, was not the source of the idea to transfer Cardenas. Peter Chang's refusal to follow Tello's alleged original recommendation to terminate Cardenas because of slow production, resulted in the intermediate action of Peter Chang first directing Tello to discover and report to Chang why Cardenas was having low production (Tr. 1107).

[25] Rosa Chang terminated ''Herminina'' in 1988 because she was a slow producer. See, above. Tello did the translating.

In short, Tello admits making a recommendation to transfer Cardenas to the cutting department job. At the same time Peter Chang, rejecting Tello's alleged original recommendation to terminate Cardenas, directs her first to discover the cause for Cardenas' low production and then apparently told Tello that Cardenas could work in the cutting department where the work was slower. If Tello's testimony is taken at face value, it was *she* who made a recommendation to transfer Cardenas to the cutting department. If President Chang's testimony is taken at face value, it was *he* who, as a result of his direction to Tello to investigate Cardenas' low production, alone made the decision to *transfer* Cardenas to the cutting department job.

On the question of Tello's power to ''transfer,'' therefore, the evidence is ambiguous. Respondent bears the burden of proof. In view of Peter Chang's testimony, I am unable to conclude that it was Tello who made a recommendation to transfer Cardenas to the cutting department job. Clearly, Tello had no power to effectively recommend termination. The first mention of transfer came from Chang. That Tello may have discussed or even suggested transfer, and then acquiesced does not encompass a power to effectively recommend. On the basis of the record before me, therefore, I am unwilling to conclude that a preponderance of credible evidence supports Respondent's burden to prove that Tello either had such power to transfer or exercised that power or could effectively recommended transfer of employees on the second shift.

(c) *Tello's alleged authority to assign work*

The determination whether Tello had the statutory power or, in any event, exercised the statutory power, to ''assign'' employees is a closer question than the resolution of whether she had the statutory powers discussed above. In fact, her alleged exercise of the power to assign must also be seen in conjunction with her responsibility for the training of new employees and, indeed, in relationship to the work atmosphere which existed on the second shift.

There is little question, as Respondent urges, that Tello was ''in charge'' of production on the second shift certainly in the sense that Respondent sought, solely from her (with rare exceptions), explanation of production problems on the second shift and informed her of its production expectations on the second shift. Her principal function was, as she testified, and as other witnesses corroborated, the fixing of machines, changing threads, helping slower employees, as well as training new employees, and from time-to-time, as a substitute loom operator. Unlike all other shift employees, except the mechanic, she was ordinarily not directly engaged in production. Whether and to what extent she was aided in this production and repair function by the second-shift mechanic; what his specific powers were; and, more important, whether Tello herself exercised the assignment of work power with independent judgment as required in Section 2(11) of the Act are the questions to be resolved. In resolving those questions, I have taken into account the testimony relating to Tello's responsibility and participation in the production process (apart from the hiring process which will be treated below), particularly the power to assign.

Peter Chang testified, for instance, that the ''supervisor'' (Tello) determines on which machines employees will work and on how many machines the employees will work (between three and five looms) based on the efficiency of the worker. According to Peter Chang, the determination of the assignment of the number of machines based on the efficiency of the worker, a determination of the supervisor, is necessarily based upon her independent judgment and evaluation of the speed and quality of performance of the employee.

Tello testified that she attended supervisor meetings in the owners' office both before and after first being called a supervisor—which she erroneously put in August 1989. In any event, both before and after Respondent's memorandum to employees of August 24, 1989, naming Tello as a supervisor, Tello testified that her job remained the same: to train new personnel; fix the machines; help run the machines; change the colors on the thread; and engage in ordinary production work on the machines for absent or vacationing employees. She continued to punch the same timecard and be subject to the same deductions from wages if she came late or was absent.

She conceded that there were 17 or 18 employees on the second shift of which 12 or 13 operated the 50 to 55 weaving machines; 3 employees were doing cutting and winding. In addition, she admitted that she was the only employee on the second shift that the employer called a supervisor; was not ordinarily a machine operator; and that she reported to President Chang problems with production machinery and problems with employees who, for instance, did not want to work an extra machine that Tello had directed them to work on (Tr. 183). Such employees would tell of their refusal directly to the front office or to Tello. Since the front office closed between 5:30 and 6 p.m., Tello would tell the front office of these problems in the later case either before 6 p.m. or on the next day. The evidence did not disclose that she enjoyed any power to coerce any such employee into working the assigned machinery.

The owners decided which colors to run and how many and of what width, and told Tello of their decisions. It was in production meetings that the owners instructed Tello of these production decisions, repeatedly complained of low production and poor quality, and in which (certainly in and after 1988) Tello told them that the fault lay exclusively in the yarn and not with the employees. When, on at least one occasion, the owners persisted and blamed Tello for not gaining greater employee production, she challenged them to fire her but the owner refused, describing Tello as ''the best'' (Tr. 238).

Production notices came to her from the owner in English and she would then notify the second-shift employees of the production orders in Spanish. Tello always told the employees she was relaying work orders from the owners. When, in these production meetings, President Chang told her to have the employees work hard, she told this to the employees and admonished them to work hard and to pay attention to their work. She testified that she was ''very close to them, watching, looking at the way they worked and helping them'' (Tr. 1350–1351).

Insofar as *training* new employees, Tello trained the new employees, as did the line leaders and, in fact, as did ordinary experienced employees. When Tello brought a new employee for training to a line leader, she told the line leader that it was Rosa Chang who had instructed Tello to bring the new employee to the line leader for training (Tr. 498). The

line leader (Lopez) told trained employees who had problems to just call the ''boss'' which is what they called Tello (Tr. 499). Line leader Lopez, having trained a new hire, would consult with Tello concerning the proficiency of the employee. If the employee was ready, Tello would take him/her from the line leader and assign him/her to machines. In addition, in the case of infrequent absence of employees, Tello would work the looms herself or assign vacant machines to another operator to take over. On such an assignment or when Tello added one or more machines for operation by a loom operator, in the event of an absent or sick employee (where Tello herself did not operate the empty machine), Tello would invariably direct the additional machine to the operator immediately adjacent to the empty machine or to a new employee (Tr. 957–958).

On the other hand, not only did the line leaders and Tello train new employees and decide when the new trainees were ready to operate their own machines, but the mechanic and even experienced employees trained new hires and would tell the owners directly that the newly trained employees were ready for assignment to production machinery. When these employees or the mechanic did so, they did not first tell Tello that they were going to make that report but went straight to the office. When the mechanic or the employees who had trained the new personnel returned from the office, they would tell Tello to assign machines to the newly trained employee (Tr. 165–169). The Changs told Tello that she could assign employees to empty machines. Rosa Chang, in particular, told her to assign employees to empty machines because the machines could not be left idle. Tello would then either work the machine herself or choose the machine operator immediately adjacent to the machine to operate empty machines. If the employee refused, Tello would tell them that those were Rosa Chang's orders, and if they had any complaints, they should go to the office and state that they did not want to work on the machine. I conclude that Tello's power to ''assign'' does not come within that power described in Section 2(11) of the Act because there is the absence of proof of her use of independent judgment in exercising the power to assign employees to machines. *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. (1991)); *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331 (1st Cir. (1948)). Where Tello was not a mere conduit, her assignments were routine.

In the case of employees who knew they were gong to be absent, the practice was for the employees to tell Tello and she would advise the office of the anticipated absence. Where the employee reported absent by phone, the employee would notify the office and the office would advise Tello of the anticipated absence so that Tello could assign or work on the vacant machines.

Mechanic Chang, as noted, also directed employees to work on machines of absent employees (Tr. 1165–1166), and, on some occasions, President Chang would direct Tello to have a particular employee work on vacant machines (Tr. 1164).

Both Tello and the second-shift mechanic would tell employees to help those other employees who were falling behind in production (Tr. 527). When it was necessary for an employee to have time off during the second shift, the employees would ordinarily ask Tello to accompany the employee to the office and together would ask permission for the employee to leave (Tr. 504). However, Tello denied giving time off to employees; rather, Tello testified that, in a particular case, she asked the employee why she had not sought the owner's permission but that the employee told her they had already gone; she looked for them and could not find them. Tello told the employee that if she left, it was her own decision but that she should tell the owners on the following day why she had left. The employee then told her that she would come in early the next day to explain the matter to Rosa Chang. On the basis of this explanation, which I credit, I cannot find that even in this one instance, Tello, in the exercise of her own discretion, gave time off to an employee. In making the finding, I am fully aware that the application for time off was made between 8 and 9 p.m. and that it would be highly unlikely for the owners to be there at that time. In this regard, it would tend to detract from Tello's credibility that she actually had asked the employee why she had not asked the owner's permission to leave if the owners had been long gone from the plant.[26]

With regard to Tello's participation in employee wage increases, the evidence shows that she either accompanied employees to the office or served as a conduit for employees desiring wage increases. Otherwise, wage rates were standardized and wage increases were solely within the power and exercise of the Changs.

The Matters of the Plant Keys and Respondent's Owners' Home Phone Number

The matters whether Tello possessed the plant keys and home telephone number of Respondent's owners requires a separate discussion notwithstanding that these issues would ordinarily constitute merely further questions of secondary indicia of supervisory status.

I have indicated, above, that I regarded one of the crucial credibility elements concerning Tello's alleged right to discipline employees to be Patricia Lalinde's testimony whether, at General Manager Kim's January–February 1990 speech to all employees, he stated that she and Tello had the right to terminate employees for failure of employees to follow instructions or any other reason. It was made the subject of

[26] On the other hand, I am not at all confident what hours were kept by President Chang. For instance, he testified that when the supervisors were on vacation, he sometimes stayed to 9 to 10 p.m. (Tr. 1026). His mechanic, Sukhyon Chang, working on the second shift, emphatically testified (Tr. 948–949) that, when Tello was on her 3- to 4-week vacation sometime after March 1989, Chang did *not* stay late, but left by 7 p.m.—thus, for a matter of weeks leaving the second-shift operating without benefit of Tello and, on this record, without benefit of a ''supervisor.'' This necessarily raises the question whether supervisory authority was required for the effective operation of the shift or whether the activities of the shift were so routinized as to obviate the presence of a supervisor exercising independent judgment. The General Counsel makes much of the fact that in the period between the April 12, 1990 Tello discharge and the appointment of Maria Estella Lopez as second-shift supervisor on August 2, 1990 (Tr. 523), there was no supervisor on the second shift for this 4-month period. Rather, after Tello's departure, only the second-shift mechanic directed employees which machines to work on (Tr. 527). Respondent denies that the mechanics are supervisors and observes that they voted in the election without challenge. I am impressed, therefore, with the General Counsel's argument: that the second shift routine required no ''supervisor,'' at least no supervisor exercising independent judgment.

much testimony and argument. I have concluded that had Kim made such a statement, Lalinde, in particular, beyond any reasonable question, would have remembered such a grant and specification of her authority. Her testimony on the point and other evidence led me to the conclusion (in light of Tello's denial) that General Manager Kim had made no such statement. It also caused me thereafter to regard Kim's and Wolford's self-assured testimony with great caution.

The contradictory testimony concerning whether Tello possessed the plant keys and the owners' telephone number likewise transcended the issue of these secondary indicia of supervisory status. It adversely affected not only the credibility of General Manager Kim, but of both Rosa Chang and President Chang. It also assumed an independent prominence and a direct bearing on the question of how much confidence Respondent placed in Tello: if Respondent did not give her the plant keys and make sure she had the residential telephone number, it would tend to show a lack of confidence and trust and hence, perhaps, a lack of independent authority.

Early in the proceeding, in direct examination, Tello testified that the second-shift mechanic, rather than herself, had the keys to the plant doors; and, in the case of regular exit by employees, fire, or perhaps other emergency, the employees, including Tello, would have to search for the mechanic so that the locked exit door could be opened. The rationale for having the keys in the sole possession and control of the mechanic was that the plant was situated in a bad area and that a male figure seemed suitable to control the keys and doors through which employees would exit both for emergency purpose and at the end of the shift (Tr. 942).[27]

In the same testimony, answering the question who had the owners' home telephone number in case of emergency, Tello testified that it was the same mechanic (Tr. 84–85). Respondent, in cross-examination, raised the same subject and got the same answer from Tello, with the further observation that the emergency procedure was for Tello to contact the mechanic who in turn would telephone the owners because he had the telephone number. This was the procedure established by the owner (Tr. 308–309). Tello testified that at one time she did have the owner's home telephone number but did not have it after they moved some years previously to a different address.

President Chang testified not only that he gave Tello his telephone number, but that he gave it to her after he and Rosa Chang had moved to the new address; that he gave it to her because she was the supervisor on the night shift and that she was given the telephone number in case of an emergency in the plant (Tr. 1028). I do not credit this testimony. Indeed, he recalled that she telephoned his residence at least twice: once when an employee injured a finger and again when Tello spoke only to his wife (Tr. 1028–1030).

Tello testified that while she had a telephone conversation with Rosa Chang at her residence in 1986 while the Changs were still living in Chicago, the telephone call was not placed from the factory nor necessarily from Tello's residence. Tello testified that the conversation was essentially between Tello's niece and Rosa Chang's daughter (Tr. 1258) and Tello did not know how the conversation started: whether Tello's niece telephoned Rosa Chang's daughter or vice-versa. Tello, however, did not initiate the telephone call. At the time, Tello was living in her cousin's house with the cousin's daughter and the conversation was between that daughter and Rosa Chang's daughter. They were apparently friends. This testimony fails to show that Tello knew the telephone number.

Tello denied ever speaking to the Changs at their house on any other occasion (Tr. 1259–1260). In particular, she denied ever reporting any injury to the Chang's at their residence by telephone (Tr. 1260), thus contradicting the testimony of President Chang. She was, however, present on three occasions when the mechanic telephoned the owner because of second shift emergencies at the factory: twice in the case of injuries to employees in 1988 and 1989, and in 1989 when there was an electrical problem causing 10 to 12 machines to stop simultaneously. In all such cases, I find that the mechanic (Chang) telephoned the owner and spoke to the owner. On none of those occasions, according to Tello, did she speak to the Changs (Tr. 1268). This testimony, that the mechanic telephoned and reported to the Changs on these emergency events, was not refuted.

General Manager Eric Kim was hired on or about January 15, 1990 (Tr. 652). He testified that Tello had been instructed to telephone the Changs in case of any major mechanical problem on the evening shift after the office closed and the Changs went home (Tr. 760). He further testified that it was not the mechanic who was supposed to call the Changs, it was Tello; and he was sure of that (Tr. 760). In fact, she was supposed to call them from Rosa Chang's office at the plant and speak to the Changs at their residence. Likewise, he knew that Tello had the Changs' home telephone number because, he said, he himself had asked her if she had the telephone number and she told him that she did. He testified further (Tr. 761–762) that, while Tello was with him in the office area and they were reviewing routines, he had asked:

> the supervisor, both supervisors—Patricia Lalinde was not necessary, but I asked both, I remember that when I first started, if they had the phone number to Mr. Chang's house just in case any emergency had come up.
>
> Q. And they said they did?
> A. They did.
> Q. Now the Changs moved?
> A. They moved 5 years ago to their address.
> Q. And that was the only time they moved so far as you know?
> A. So far as I know, they moved to their new residence 5 years ago.
> Q. And it was obviously after the move that you say that Ms. Tello told you she had the Chang' home phone number?
> A. Yes.

At this point in the record, I had not yet rejected Respondent's offer to prove that Patricia Lalinde was a supervisor. Hence, it seemed to me that General Manager Kim was attempting to create an infrastructure of testimony to support what appeared to be an important element of Respondent's case, that both Tello and Lalinde were supervisors. But the particular vice in General Manager Kim's testimony, incred-

[27] Why another set of similar keys were not given to Tello, certainly for emergency purposes, was not explained.

ible when given and painful on review, was that, in attempting to show the routine, the regularity, of his asking both his ''supervisors' if they had the residential telephone number, he testified that he asked *both* supervisors. As appears in the above-indented testimony, he then instantaneously articulated the fact, as it struck him on the witness stand, that Patricia Lalinde was the *day-time* supervisor. Since all Respondent's supervisors and officers were present in the plant during the day-time shift, and since Lalinde worked only the day shift, it would be superfluous to ask the day-time supervisor whether she had the telephone number. Lalinde, working the day shift, would be working in the presence of all of Respondent's supervisors and officers already in the plant. Any work-place emergency would be handled directly. There would be no need to telephone the owners at their residence. Thus, when General Manager Kim testified that he ''asked the supervisor, both supervisors—Patricia Lalinde was not necessary, but I asked both . . . if they had the telephone number'' he immediately realized that those were embarrassingly superfluous statements that emerged from his mouth, that the inclusion of Patricia Lalinde was ''not necessary'' but nevertheless, he ''asked both.''

A quick and intelligent witness like General Manager Kim, dissatisfied with testifying merely that he spoke to Tello (''asked the supervisor''), thus, at first, was suggesting a routine review of procedures by testifying that he spoke with ''both supervisors'' about the matter. He was attempting to bolster Respondent's position that both Tello and Lalinde were supervisors. He immediately realized however, that the inclusion of Lalinde was unnecessary and senseless, for the reasons above described, and so he added: ''but I asked both'' in order to vindicate his otherwise needless reference to and inclusion of Lalinde. Patricia Lalinde was the next witness called by Respondent after Kim. Her testimony is barren of any reference to any Kim conversation with her concerning telephone numbers or her possession of the Changs' residential telephone number. Kim, I conclude, asked neither Lalinde nor Tello. Thus, notwithstanding President Chang's testimony, I credit Tello's denial of having the current telephone number; her denial that she ever contacted the Changs concerning mechanical or personnel difficulties at the plant; and her testimony that it was the mechanic, and the mechanic only, who contacted the Changs because of personnel problems or mechanical difficulties on the second shift. One good reason for Respondent requiring the mechanic to have the telephone number and contacting him in case of emergency was the Changs' limited command of English and the desire to get details from a Korean-speaking person in case of emergencies. Yet, in case of an emergency, it would seem that the ''supervisor'' should have the number as well.

In view of the evidence of record herein and the quality of testimony received from President Chang and particularly General Manager Kim on this point, I draw an inference unfavorable to their assertion that Respondent reposed confidence in Tello by holding her responsible for communicating with the Changs in cases of emergencies of any type on the second shift.

I conclude that Respondent's failure to require that Tello possess the keys and its failure to give (and maintain) its telephone number to Tello and, in addition, in reposing confidence only in the mechanic to control egress from the factory and to communicate with them in cases of emergency on the second shift, leads to an inference that, at least insofar as secondary indicia of supervisory capacity are concerned, Respondent did not consider Tello to be worthy of confidence and supervisory responsibility. This conclusion is drawn notwithstanding her title, her high pay (not as high as the mechanic), her accountability for second shift quality and production, her attendance at supervisory meetings where production and quality were discussed, and notwithstanding the other assertions of secondary indicia that are present on this record. If Respondent did not think enough of Tello to give her the keys and the Changs' home telephone number in case of emergencies, the fact that she was highly paid, trained employees and the sole person holding the title supervisor on the night shift is not heavy evidence. Her hourly pay, punching the time clock, premium pay for overtime and loss of pay for lateness or absence—working conditions she shared with unit employees are further elements against supervisory status.

Responsible Direction

Section 2(11) of the Act specifies, as one of the primary indicia, the function of ''responsibly to direct'' the employees. I have discussed this power under other substantive sections including the power to transfer employees, to assign work, the power to discipline employees and in matters to appear subsequently in this decision.

As in the case of Tello's alleged power to assign work, and unlike her alleged power to discipline employees, the issue of her ''responsible'' direction of employees is a close question. On the one hand, I have found that at all material times in or about the time of her discharge, and for a period of 2 years preceding, Respondent had held her out as and called her a ''supervisor as early as April, 1988 (R. Exh. 9); that she was described to the employees as a supervisor at least as early as August 24, 1989 (R. Exh. 1), in a document distributed to all of Respondent's employees in late August 1989. Moreover, as above noted, she was introduced to and known to the 17–18 night-shift employees as the ''supervisor'' or ''boss.'' She regularly helped employees in their day-to-day problems with the production machinery.

On the other hand, she not only did not have the keys to the factory doors, but she did not even have the keys to the office to get first aid equipment for injured employees. Rather she had to seek out the mechanic who possessed the keys (Tr. 945–946) to get to first aid materials. I have already found that Tello did not have the telephone number of Respondent's residence in case of emergencies notwithstanding that it was only she who took injured employees to the hospital when Respondent's front office was closed during the night shift (Tr. 945).[28]

[28] Respondent's mechanic on the second (night) shift (Sukhyon Chang) testified that employees on the second shift regularly left early because of sickness: once a week, certainly three to four times per month (compare: Tr. 940–941 with Tr. 949). In such cases, as above noted, Tello would either operate the vacant machines herself or distribute the work to immediately adjacent operators. However, early leaving employees, according to mechanic Chang, always spoke to Tello before leaving, after which Tello would request mechanic Chang to open the doors of the factory because Chang had the keys and the doors were locked. He testified that employees

Continued

Furthermore, she could not put a band-aid on an injured finger without getting mechanic Chang to unlock Rosa Chang's office where the first aid equipment was kept, nor could she unlock the doors to permit a sick or injured employee to leave or to take them to the hospital. She had no power to permit time off to a sick employee and she could not discipline employees for refusing her work assignments. Under these circumstances, I conclude that she could not ''responsibly'' direct the activities of employees on the night shift within the meaning of Section 2(11) of the Act. Compare: *Superior Bakery v. NLRB*, 893 F.2d 493 (2d Cir. 1990); enfg. 294 NLRB 256 (1989), with *NLRB v. Monroe Tube Co*., 545 F.2d 1320 (1976). See *NLRB v. Yuba Natural Resources*, 824 F.2d 706 (9th Cir. 1987), and cases cited therein. The fact that employees considered an employee to be their ''boss'' is a vague and undefined designation without statutory basis, ibid. Finally, the fact that for much of the night shift, Tello is alone among 17 or 18 other employees and to whom the employees look as an authority figure does not mean that she possesses any of the 2(11) primary indicia. For instance, a night watchman is not a supervisor because he is the only person on the premises at night, and if there were several watchmen, it would not follow that at least one of them was a supervisor. *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991), enfg. 297 NLRB 155 (1989), citing *NLRB v. Res-Care*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Central National Gottesman*, 303 NLRB 143.

The Authority to Hire

Respondent apparently concedes (R. Br. 81–82) that since Eric Kim became General Manger in mid-January 1990, he is the person responsible for hiring new employees commencing with that date. Kim interviews the applicants for employment, reviews their applications, particularly for their immigrant status, and work permits and he tests their ability to distinguish colors. He also judges whether they are capable of standing all day throughout the shift (Tr. 701–702). The evidence is clear that Tello never requested the hiring of employees since Kim became general manager in January 1990 up through the time of her discharge on April 12, 1990. Thus, for the 3-month period prior to, and at the time of, her discharge, whatever the situation prior thereto, Tello had neither the power to hire in her own right nor the power to effectively recommend hiring.

Prior to the time January 1990 when Kim became the sole person with the power to hire, Tello suggested more employees for employment than other of Respondent's employees and more of them were hired. Respondent, especially Rosa Chang, perhaps placed greater confidence in a prospective employee when that employee was recruited by Tello than other employees. Nevertheless, it was President Chang and Rosa Chang who made the decisions to hire employees and the fact that they reposed greater confidence in the quality of applicants naming Tello as their recruiter does not suggest that Tello had the power to effectively recommend hiring. Many of Respondent's employees recruited prospective employees for Respondent. They were all ultimately judged independent of who the recruiter was. Tello, for instance would bring people into the office and they would then fill out applications (Tr. 1127) just like other candidates. While the Changs might discuss with Tello or Patricia Lalinde the quality of possible candidates, it was only Rosa Chang and President Chang who would review the applications and then decide on hiring (Tr. 1129). This was before Kim was employed but after 1987 (Tr. 1129).[29]

The crucial fact, however, is that in the 3-month period prior to her April 12, 1990 discharge, Tello had neither the power to hire nor the power to effectively recommend hiring. I therefore conclude that she did not have the power to ''hire'' within the meaning of Section 2(11) of the Act.

The Authority to Reward or Adjust Grievances

To support its contention that Tello had the authority to reward or adjust grievances, Respondent cites an occurrence in the fall of 1988, a single and remote event. Prior to that time, second-shift employees worked from 3:30 to 10:30 p.m., Monday through Friday. In addition, there was a workday of 4 or 5 hours each Saturday to compose the 40-hour week. In the fall of 1988, the schedule was changed so that the second-shift worked 3:30 to 11:30 p.m. and no work on Saturdays.

This matter was first raised in President Chang's testimony (Tr. 1031 et seq.) wherein he said that the suggestion for the change came from Tello; that she said it was a ''hasels'' to work on Saturdays; and that if the working hours during the week were extended 1 hour each night, there would be no necessity for Saturday work. As a result, President Chang testified that: ''we decided to change the schedule. No work on Saturdays. And the supervisor told me that she would even work overtime on Saturdays if there was any extra work'' (Tr. 1032).

never asked *him* for permission to leave early (Tr. 943) but that in the 3-week period of Tello's vacation, he could not remember anyone being sick during that period (Tr. 950–951). In view of his prior testimony that sickness ordinarily occurred once a week, I find it remarkable that during the period of Tello's vacation there was no one sick, i.e., if there was a sick employee, to whom would the request for leaving early be made? Thus, during Tello's vacation, after the supervisors in the office left by 6 p.m. there was apparently no one in supervisory status present on the second shift to whom sick employees could report their illness or their decision to leave early because of it. This would be true, of course, whether or not any employee actually became ill in that 3-week period of Tello's vacation. There was therefore no one presentto ''responsibly'' exercise judgment as to permitting an ill employee leave the premises. The second shift, therefore, operated for a 3-week period without the presence of a ''supervisor.'' See fn. 26, supra.

[29] President Chang testified (Tr. 1004–1009) that before Kim became General Manager in January 1990, each shift supervisor (Tello and Lalinde) not only did the recruiting but had the final decision in hiring. In Tello's case, he testified that not only were qualifications of the applicant not discussed, but the applicant was hired by Tello without prior notice to management. Such testimony contradicts the testimony of Rosa Chang in two respects: she testified that management did discuss the candidates with Tello and Lalinde; and it was Rosa Chang and Peter Chang who made the decision to hire (Tr. 1128–1129). Regardless of the hiring practices and responsibilities prior to Kim being named general manger in January 1990, *however*, after that date and up to her April 12, 1990 discharge, there is no evidence that Tello had either the power to hire or to effectively recommend hiring. Her powers must be measured at the time of discharge. She had no power to hire or effectively recommend at that time.

In rebuttal, Tello credibly added to the circumstances surrounding the change. She said that it was her idea; she then asked the employees if they wanted to cease Saturday work; when they told her that they agreed with her, there was supposed to be a meeting with the owner. Tello went to President Chang and told him that the employees (''all of us'') wanted to have a meeting to let him know that: ''we did not want to work on Saturdays any more'' (Tr. 1261). Chang told her that a meeting was unnecessary and that Tello could tell him at once what the employees were ''demanding'' (Tr. 1262). Tello then told Chang that: ''we only wanted to work 5 days per week. That we did not want to work on Saturdays anymore'' (Tr. 1262). Chang said that this was ''impossible'' because there was nobody to take care of the factory and that the employees would have to work more hours if Saturday work was eliminated. Tello told him that: ''if he didn't give us 5 working days per week, we were not going to work on Saturdays any longer.'' (Tr. 1262). When Chang raised the problem of who would care for the machinery on Saturday, Tello told him that: ''we are determined not to work on Saturdays any more'' (Tr. 1262).

Chang said he wanted time to think the matter over. A few days later, he came to Tello's work place and told her that he agreed that the employees would work 5 days a week (Tr. 1263). As a result of the change, the employees worked Monday through Friday, but now 3:30 through 11:30 p.m. instead of 10:30 p.m. (Tr. 1263). This added an extra hour to each workday totaling 40 hours per week. After this change, there was periodic Saturday work only for overtime purposes. Saturday overtime work was a matter which President Chang decided and over which Rosa Chang exercised control to the extent of deciding which employees would work overtime and whether Lalinde or Tello would be present at such time.[30]

Similarly, when Tello requested of President Chang an increase in break time from 10 to 15 minutes, and when she asked President Chang for employees' not to work on Good Friday, it is clear that Tello, in approaching President Chang, was pKimarily acting as the mouthpiece of the employees, rather than as supervisor of Respondent adjusting employee grievances (Tr. 610). As office clerical Wolford testified, it was the night-shift workers who did not want to work Good Friday and used Genoveva Tello as their voice (Tr. 609–610).

When President Chang then desired to tell the employees that they could be absent on Good Friday but would not be paid for that day, he directed Tello to tell them (Tr. 610). No clearer use of Tello as a conduit could be constructed.

Again, with the change of breaktime, increasing from 10 to 15 minutes, and with employee wage increases, the evidence shows that Tello was acting as the mouthpiece of employees in requesting wage increases and changing the breaktime.

Contrary to Respondent's suggestion (Br. 94), the evidence shows that Tello was not responsible for the appointment of either of the two line leaders. Rather, as Respondent stated, she merely communicated the change in pay and status to them following President Chang's decision. President Chang informed Tello of his decision and directed her to tell the new line leaders of their promotion. That does not signify that he was approving a decision made by Tello; rather, it shows that President Chang, as in the case of his Good Friday decision and the cessation of Saturday work, was using Tello as his conduit rather than telling the employees himself.

I conclude that the facts presented under this 2(11) rubric present perhaps the weakest of Respondent's arguments relating to Tello's supervisory capacity. For in this instance, not only was Tello shown to be a conduit of information from Respondent to the second-shift employees, but it showed that she was, in large part, the mouthpiece of the employees rather than their supervisor. She was not adjusting employee grievances; Respondent was.

I was particularly impressed by Tello's uncontradicted and credited testimony that she spoke to President Chang concerning the cessation of Saturday work on the basis of second-shift employee *demands* in which she joined. Except perhaps as a conduit, a supervisor does not ordinarily make demands on her employer on behalf of employees. While she might notify the employer of what was going on in the shop, she does not place herself in the leadership of making demands, changing working conditions against the interest of the employer especially when, as here, he voices reservations about the change. It is difficult to imagine any employee, much less a supervisor, telling the owner of the business, who was opposed to the change, that: ''if he didn't give us the 5 working days per week, we were not going to work on Saturdays any longer'' (Tr. 1262). If anything approaching this conversation from a ''supervisor'' actually occurred, and I believe it did, a proper response might have been to discharge Tello on the spot rather than to give in to her demands. For an alleged supervisor to take this repeated, imperious position, and in such a tone, to the employer demonstrates that Tello was viewed by President Chang as serving purely employee interests. Her testimony was not rebutted.

On the basis of the above facts, I am constrained to conclude that Respondent has failed to prove, by a preponderance of the credible evidence, that Tello had authority to reward or adjust grievances, or to effectively recommend same, within the meaning of Section 2(11) of the Act. Rather, the

[30] Again, to the extent that Respondent argues (R. Br. 91) that it was the supervisor (i.e., Tello) rather than Rosa Chang who chose the employees for Saturday overtime work, I reject that argument. I discredit the testimony of Rosa Chang and President Chang and credit the testimony of Maria Estella Lopez, an apparent present supervisor of Respondent, promoted in August 1990 from line-leader on second shift to fill Tello's place and executing that office at the time of her testimony. Respondent evidently misreads the transcript testimony insofar as he suggests that Lopez testified that ''she thought'' Rosa Chang chose employees to work Saturday overtime. Lopez did not testify that ''she thought'' Rosa Chang chose employees. She testified (Tr. 525–526):

> Q. And it was Rosa Chang during the period of time that Genoveva [Tello] was still working there, it was Rosa Chang who chose the employees to work overtime on Saturdays. Is that correct?
>
> A. Yes, that is true.

Contrary to Respondent, Tello corroborated Lopez. Contrary to Respondent's description of the record (R. Br. 92). Tello testified that it was Chang or Rosa Chang who determined which employees were going to work overtime and that pursuant to these selections, Tello would inform the employees (Tr. 1279). When employees requested of Tello that they be allowed to work overtime, and Tello made recommendations to the owners to that effect, her recommendations were never followed (Tr. 1280).

preponderant evidence shows that Respondent used Tello as a conduit for its decisions and orders and, further, that Tello, far from being a statutory supervisor, openly displayed her interest as that of an employee by making demands on behalf of herself and other unit employees concerning their mutual working conditions and hours of work.

In sum, I conclude that the evidence shows, with regard to the primary indicia in Section 2(11) of the Act, that at best, that Genoveva Tello was used by Respondent as a conduit to its employees of its decisions; that although she enjoyed the title of ''supervisor'' and a much higher hourly pay rate than most other unit employees, and did not work as a mere production employee but rather trained employees, fixed machines, and helped other employees, she nevertheless identified herself as a unit employee by sharing the interest common to unit employees concerning their hours of work and working conditions. At the time of discharge, she still punched the timeclock, was docked for lateness and absence, and was paid for overtime, the same as unit employees. Even in her assignment of machines to employees who she trained, there was no proof of the use of independent judgment with regard to the training and assignment of employees to the machines other than that of a skilled workman making a technical judgment as to the proficiency of the employee. *Southern Bleachery & Printworks*, 115 NLRB 787, 791, enfd. 257 F.2d 235 (4th Cir. 1958); cert. denied 359 U.S. 911 (1959). Furthermore, other employees and leadmen made the same judgment and reported the qualifications of the new employee to the front office without the intervention of Tello. She could neither coerce nor repKimand employees. Moreover, the record shows that during the period of her 3- to 4-week 1989 vacation, there was no supervisor present on the second shift to fill in for Tello. Even after her discharge, there was no supervisor responsible for the second shift between April 12 and the August 2 appointment of Maria Estella Lopez as the second-shift supervisor. Only the mechanic was ''in charge'' of the second shift as he had been during the 3- to 4-week Tello vacation. At the time of her April 12 discharge all the 2(11) enumerated powers continued to remain in the office.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has failed to prove, by a preponderance of the credible evidence, that Genoveva Tello is a supervisor within the meaning of Section 2(11) of the Act.

4. By discharging its employee, Genoveva Tello, because she engaged in activities on behalf of, supported and demonstrated sympathy for, the Union, Respondent discKiminated against an employee, thereby discouraging union membership and activities, in violation of Section 8(a)(3) and (1) of the Act.

5. By requesting that Tello conduct surveillance among its employees to discover the source of employee discontent leading to their supporting the Union, and by coercively interrogating her as to employees' union activities Respondent engaged in soliciting an employee to engage in unlawful surveillance of its employees' union activities and unlawful interrogation thereby violating Section 8(a)(1) of the Act.

6. Respondent violated Section 8(a)(1) of the Act by threatening to close the plant or to move the plant to mainland China in the event that the Union came in, and by promising improvement of employee benefits to forestall such event.

7. By failing to prove that Genoveva Tello is a supervisor within the meaning of the Act, and the preponderant evidence demonstrating that Tello in any event was discharged 6 weeks before the election and would not be reinstated, Respondent has failed to support its objection that Tello's involvement in the Union's organizing effort taints the union showing of interest or the results of the Board-conducted election in Case 13–RC–18012, or coerced employees into supporting the Union in the election.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and to take the following affirmative action which is deigned to effectuate the policies of the Act.

It is recommended that Respondent be ordered to reinstate Genoveva Tello to her former job, or if such job no longer exists or is not available, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacement, and to make her whole for any benefits and loss of pay, less interim earnings, that she may have suffered because of her being unlawfully discharged. Any such sum shall be calculated in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also remove from its files any reference to the Tello discharge of April 12, 1990, and shall notify her, in writing, that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against her. For remedial purposes, the fact that Tello's former job may now actually be a supervisory position, without Section 2(11) of the Act, constitutes no bar to her being reinstated as a supervisor with backpay. That matter has been disposed of in *Golden State Bottling Co. v. NLRB*, 467 F.2d 164 (9th Cir. 1973); affd. 414 U.S. 168, 188 (1973). Compare: *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982), and *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953), with *Chemical Workers v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976), and *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987).

[Recommended Order omitted from publication.]